No. 84-1044

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

PACIFIC GAS AND ELECTRIC COMPANY,

Appellant,

v.

THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA, ET AL.,

Appellees.

On Appeal from the Supreme Court of California

MOTION TO DISMISS

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Appellee, the Public Utilities Commission of the State of California, respectfully moves the Court for an order dismissing this appeal on the ground that it does not present a substantial federal question.

OPINIONS BELOW

The opinions below are correctly set forth in the Jurisdictional Statement.[1]

[1] The Commission's initial majority opinion in Decision No. 83-12-047 (Dec. 20, 1983) and its subsequent modifying opinion in Decision No. 84-05-039 (May 2, 1984) are separately reproduced in the Appendix to the Jurisdictional Statement ("J.S. App."), at A1-A34 and A45-

JURISDICTION

The judgment of the California Supreme Court became final and was entered on November 4, 1984. Cal. R. Ct. 24(a). The notice of appeal was timely filed in the California Supreme Court on November 5, 1984. This Court's appellate jurisdiction is invoked under 28 U.S.C. § 1257(2).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. I provides in part:

> Congress shall make no law . . . abridging the freedom of speech . . . .[2]

The relevant state constitutional and statutory provisions conferring regulatory authority on the Commission are reproduced in the Appendix hereto ("App."), at A57-A59.

STATEMENT OF THE CASE

Factual Background

Pacific Gas and Electric Company ("PG&E"), a regulated "public utility" within the meaning of Cal. Const. art. XII, § 3, and Cal. Pub. Util. Code § 216, bills its customers for utility service each month by mail and recovers its reasonable costs of billing, including postage, materials, labor and overhead, in rates.

As a necessary and proper part of the billing process, PG&E encloses in each customer's billing envelope a bill, a return

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A54, respectively. For the convenience of the Court, a single conformed copy of the Commission's decision *as modified* is reproduced in the Appendix hereto ("App."), at A1-A40.

[2] The First Amendment guarantee of free speech is made applicable to the States by the Due Process Clause of the Fourteenth Amendment. *Gitlow v. New York*, 268 U.S. 652, 666 (1925).

envelope and such additional bill inserts as are required by statute[3] or by the Commission.[4]

Based on present requirements established or approved by the Commission, PG&E's billing envelope and its required contents, taken together, normally weigh a fraction of an ounce.[5] However, present regulations of the United States Postal Service require prepaid postage on each billing envelope in an amount sufficient to cover the delivery of mail weighing a full ounce. Accordingly, PG&E's present billing and postage requirements generate a quantum of weight allotment in the envelope, not normally consumed by the bill or the enclosures otherwise required by the Commission, upon which postage has been prepaid. For convenience, the Commission has characterized this prepaid quantum of weight allotment as the "extra space" in the billing envelope.[6]

PG&E has traditionally communicated with its customers by enclosing its publication *Progress* in the extra space in the billing envelope. The costs of preparing and printing *Progress* are not included in rates and thus are effectively paid by the company's shareholders. However, under present practice, PG&E recovers 100 percent of its estimated postage costs for billing from the ratepayers. It thus recovers in rates the cost of that postage applicable to the extra space, including that portion of the space occupied by *Progress*. In this way, the ratepayers involuntarily subsidize the delivery of PG&E's speech.

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[3] *E.g.*, Cal. Pub. Util. Code §§ 454(a), 786(b) and 786(c).

[4] *See* note 17, *infra*.

[5] The cumulative weight of these items will of course vary, depending on the number and nature of inserts required for a given month as well as any variations in the billing requirements for individuals or different classes of customers.

[6] The Commission's decision defines the "extra space" as "the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost." App. A3.

Moreover, the extra space has economic value to the ratepayers far in excess of its applicable postage costs. If that space were used to generate income—*e.g.*, by selling the use of the space to advertisers—the income generated would likely be very substantial.[7] Such income would engender a corresponding reduction in PG&E's revenue requirement and thus in rates. Accordingly, the exclusive appropriation of the extra space by PG&E without charge results in PG&E's obtaining a windfall from the ratepayers measured by the economic value of the space. Otherwise stated, the failure to exploit fully the economic value of the extra space for the benefit of ratepayers results in the ratepayers' loss of opportunity costs for a medium of communication which they underwrite.

Prior Decisions

In an earlier decision, Decision No. 93887 (Dec. 30, 1981), as modified by Decision No. 82-03-047 (Mar. 2, 1982), the Commission considered the claim of Toward Utility Rate Normalization ("TURN"), a frequent intervenor in Commission proceedings, that PG&E had violated the Public Utility Regulatory Policies Act of 1978 ("PURPA"), 16 U.S.C. §§ 2623(b)(5) and 2625(h), by recouping from ratepayers indirect expenditures for political advertising *(i.e., Progress)* in the billing envelope. J.S. App. A67, A72.

The Commission concluded that the economic value of the extra space in the billing envelope should be "considered as ratepayer property," since the ratepayers create that value by paying the postage for delivery of the entire contents of the envelope. J.S. App. A67. The Commission further concluded that PG&E's insertion of *Progress* in the envelope captured that economic value without charge to PG&E in violation of PURPA.

[7] There are, of course, legitimate reasons why the Commission might find the sale of advertising space objectionable. Such use would do little to increase public awareness of regulatory issues or public participation in the Commission's proceedings. Similarly, placing the utility bill in a sheaf of advertisements might impede the convenience and efficiency of the billing process.

Id. However, rather than deciding in that proceeding "what steps [it] should take to utilize most efficiently for the ratepayers' benefit the 'extra' space . . . in the billing envelope," J.S. App. A69, the Commission invited the initiation of a collateral proceeding addressing the question of remedy:

> We invite TURN or any other interested party to file an application with this Commission with a proposed solution to the extra space problem. The application would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the "extra space" more efficiently for ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such application.

J.S. App. A71.[8]

Thereafter, in Decision No. 83-04-020 (Apr. 6, 1983) ("the UCAN decision"), the Commission authorized the establishment of a consumer advocacy group to be called San Diego Utility Consumers Action Network, Inc. ("UCAN") and required San Diego Gas and Electric Co. ("SDG&E") to allow the group to use the extra space in its billing envelope four times per year for a two-year period. J.S. App. A90-A110. SDG&E did not challenge the Commission's final order in the courts, and UCAN has utilized SDG&E's billing space on several occasions to solicit membership and funds.

The Decision Below

TURN responded to the Commission's invitation issued in Decision No. 93887 and, on May 31, 1983, filed a new and separate complaint with the Commission (Case No. 83-05-013), seeking access to PG&E's billing envelope for purposes of soliciting funds, increasing membership and informing PG&E

[8] TURN's petition for writ of review of the Commission's failure to adopt a specific remedy was denied by the California Supreme Court on August 13, 1982. *See* S.F. No. 24415. PG&E elected not to seek judicial review of Decision No. 93887 as modified.

ratepayers of energy-related issues affecting their bills. TURN's complaint presented three proposals, the first two of which involved the insertion in PG&E's billing envelope of "checkoff" lists of multiple consumer advocacy organizations and the third of which would grant TURN alone broader access to the billing envelope.

In Decision No. 83-12-047 (Dec. 20, 1983), as modified by Decision No. 84-05-039 (May 2, 1984), the decision below, the Commission granted TURN access to the extra space in PG&E's billing envelope four times per year for a period of two years,[9] rejecting the "checkoff" proposals because they contemplated the participation of multiple organizations and because TURN was the only organization which had applied for access to the billing envelope. App. A21-A22, A24, A35.[10]

The decision also provided that PG&E be permitted to use the extra space during the remaining eight months of the year as well as any remaining extra space not used by TURN during the months TURN's material is inserted; that PG&E and TURN each determine the content of its own material; that the costs of inserting material in the extra space be borne by the sponsor of the material; that PG&E bill TURN for all reasonable costs to the company occasioned by the addition of TURN's material; and that TURN's material clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or the Commission. App. A38-A39.

On October 4, 1984, the California Supreme Court filed its order summarily denying PG&E's petition for review. This appeal follows.

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[9] The Commission concluded that its previous final determination in Decision No. 93887 as to the ownership of the extra space was not properly subject to relitigation by PG&E in this case. App. A36.

[10] Because TURN was the only applicant for access to PG&E's billing space, the issue of how the competing interests of multiple applicant organizations should be resolved is not raised in this case. *See* App. A21-A22, A24, A35. The sole issue here is whether the Commission violated PG&E's First Amendment rights by granting access to TURN.

SUMMARY OF ARGUMENT

The Commission's decision granting TURN periodic access to the extra space in PG&E's billing envelope constitutes reasonable regulation of a public utility subject to the Commission's jurisdiction. The regulation reaches only that portion of the envelope which, under California law, is the property of the ratepayers. Indeed, even if the extra space were deemed utility property, the pervasive scheme of utility regulation in California would subject it to the Commission's regulatory control. The Commission has regulated the billing envelope as a conduit for disseminating service- and rate-related information to utility customers for more than 70 years.

The Commission's decision does not implicate, let alone abridge, the utility's First Amendment right to speak. The decision simply does not limit the utility's voice in the billing envelope. It merely raises the speculative possibility that PG&E may infrequently be required to pay the cost of delivering its message through the United States mail. Hence, the decision regulates economics, not expression, and in no way implicates First Amendment values.

Nevertheless, the decision satisfies First Amendment standards. It is plainly justifiable as a reasonable "time, place, and manner" regulation because it is content-neutral, is narrowly tailored to serve several significant governmental interests, and leaves open ample alternative channels for communication. *Clark v. Community for Creative Non-Violence*, ____ U.S. ____, 82 L.Ed.2d 221, 227, 104 S.Ct. 3065, 3069 (1984), and cases there cited. However, since the decision involves a nonpublic forum on property owned or controlled by the government, it is justifiable simply because it is content-neutral and reasonable. *Perry Education Assn. v. Perry Local Educators' Assn.*, 460 U.S. 37, 49 (1983); *U.S. Postal Service v. Greenburgh Civic Assns.*, 453 U.S. 114, 132 (1981).

Nor does the decision violate the utility's First Amendment rights to refrain from speaking or to refrain from associating with the views of another. These claims are foreclosed by *PruneYard v. Robins*, 447 U.S. 74, 85-88 (1980).

The Court may properly conclude, without the necessity of further briefing or oral argument, that PG&E's First Amendment claim is foreclosed by its prior decisions. The claim should therefore be deemed insubstantial and the appeal dismissed.

ARGUMENT

PG&E'S FIRST AMENDMENT CLAIM IS INSUBSTANTIAL

I

INTRODUCTION: THE COMMISSION'S DECISION REASONABLY REGULATES A PUBLIC UTILITY SUBJECT TO ITS JURISDICTION

A. The Regulation Reaches Only that Portion of the Billing Envelope Which, Under California Law, Is the Property of the Ratepayers

The Commission's determination that the prepaid extra space in PG&E's billing envelope is the property of the ratepayers is final under California law. That determination was made in Decision No. 93887, review of which was not sought by PG&E in the California Supreme Court or in this Court. Accordingly, under California law that determination is *res judicata*. Cal. Pub. Util. Code §1709; App. A59; *Sale v. Railroad Commission*, 15 Cal.2d 612, 616, 104 P.2d 38 (1940), and cases there cited; Witkin, California Procedure, Judgment §159 (2d ed. 1971). *See also People v. Western Air Lines*, 42 Cal.2d 621, 630, 268 P.2d 723, *appeal dismissed*, 348 U.S. 859, 860 (1954); *Napa Valley Electric Co. v. Railroad Commission*, 251 U.S. 366, 371-373 (1920); *Southern Pacific Transportation Co. v. Public Utilities Commission*, 716 F.2d 1285, 1289-1291 (9th Cir. 1983), *cert. denied*, ____ U.S. ____, 80 L.Ed.2d 457, 104 S.Ct. 1908 (1984); *Pacific Telephone & Telegraph Co. v. Public Utilities Commission*, 600 F.2d 1309, 1311-1312 (9th Cir.), *cert. denied*, 444 U.S. 920 (1979); *Consumers Lobby Against Monopolies v. Public Utilities Commission*, 25 Cal.3d 891, 901, 160 Cal.Rptr. 124, 603 P.2d 41 (1979).

Indeed, the Commission explicitly accepted the *res judicata* argument raised below, concluding that "[t]his Commission's

findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding" and "should be considered final for the purpose of this proceeding." App. A36. These determinations were ratified by the California Supreme Court's summary denial of review. *Consumers Lobby Against Monopolies*, *supra*, 25 Cal.3d at 901; *see Sutter Butte Canal Co. v. Railroad Commission*, 279 U.S. 125, 139 (1929). Accordingly, the Commission's determination of the ownership of the extra space is final for purposes of this appeal.[11]

B. Even if the Extra Space Were Deemed Utility Property, the Pervasive Scheme of Utility Regulation in California Would Subject It to the Commission's Regulatory Control

The California Supreme Court's summary denial of review also ratifies the Commission's determination that, irrespective of the ownership of the extra space, the Commission's state constitutional and statutory mandate to regulate public utilities, their practices, and their property extends to the order here. App. A6-A8, A32-A33, A37. *Sutter Butte Canal Co.*, *supra*, 279 U.S. at 139.

The rationale underlying the state's extremely broad power to regulate public utilities has often been restated. As noted in Justice Blackmun's dissent in *Consolidated Edison Co. v. Public Service Commission*, 447 U.S. 530, 549-550 (1980), a public

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[11] The *res judicata* determination constitutes an adequate and independent non-federal ground for the decision below because the First Amendment confers no right on the utility to speak, or to limit the speech of third parties, on the property of another. *Durley v. Mayo*, 351 U.S. 277, 281 (1956); *Stembridge v. Georgia*, 343 U.S. 541, 547 (1952). It has long been established that a state *res judicata* determination presents no substantial federal question. *San Francisco v. Itsell*, 133 U.S. 65, 67 (1890); *see Southern Pac. Transp. Co. v. Public Utilities Commission*, ____ U.S. ____, 80 L.Ed.2d 452, 104 S.Ct. 1901 (1984) *(mem.), dismissing appeal from California Supreme Court's summary denial of review of Commission decision based on* res judicata. Notably, PG&E appears to have acquiesced in this final determination of state property law; the utility has now abandoned its Fifth Amendment "taking" argument raised below.

utility is a state-created monopoly, permitted to operate as such solely because of a determination by the state that the public interest is better served by protecting the utility from competition. "This exceptional grant of power to private enterprises justifies extensive oversight on the part of the State to protect the ratepayers from exploitation of the monopoly power through excessive rates and other forms of overreaching." *Id.* at 550.

The California Public Utilities Commission was established for this purpose. "Created by the Constitution in 1911, the commission was designed to protect the people of the state from the consequences of destructive monopoly in the public service industries." *Sale v. Railroad Commission, supra,* 15 Cal.2d at 617.

Under its broad state constitutional and statutory mandate, the Commission may do all things "necessary and convenient" to the exercise of its regulatory power, including the regulation of a utility's rates, services, rules, practices, appliances, equipment, facilities, methods of distribution, methods of transmission and physical property. Cal. Pub. Util. Code §§ 701, 728, 729, 761 and 762; App. A57-A59; *see, e.g., Munn v. Illinois,* 94 U.S. 113, 125-130 (1877); *New Orleans v. Dukes,* 427 U.S. 297, 303-306 (1976); *Nebbia v. New York,* 291 U.S. 502, 523-525, 537 (1934); *Sutter Butte Canal Co., supra,* 279 U.S. at 135-138; *General Telephone Co. v. Public Utilities Commission,* 34 Cal.3d 817, 822-827, 195 Cal.Rptr. 695, 670 P.2d 349 (1983). As found by the Commission and the California Supreme Court, this mandate extends to the Commission's order here.

C. The Commission Has Historically Regulated the Billing Envelope as a Conduit for Disseminating Service- and Rate-related Information to Utility Customers

A brief history of the Commission's regulation of the billing process is helpful in placing PG&E's First Amendment claim in its proper context. At the outset, however, it is important to understand that the billing process is integral to utility service and is inextricably entwined with rates. When a customer signs up for service such as that provided by PG&E, he or she is entitled not only to gas and electric power but also to a monthly

bill which informs him or her with sufficient specificity of the amount of power used, the rate charged and the amount due. A utility's failure properly and timely to bill its customers may *inter alia* discourage timely payment, deprive the customers of sufficient information to assess the accuracy of the bill, encourage billing disputes, increase the utility's costs of collection, increase uncollectibles or bad debt, heighten the frequency of customers having their service erroneously discontinued for nonpayment and substantially inconvenience both the utility and its customers. Such failure constitutes "poor management [which] result[s] in injury to those who do pay their bills." *Tujunga Water and Power Co.,* 7 Cal.R.R.C. 580, 589 (1915). In addition, such failure will likely necessitate an increase in rates.

One inevitable function of the billing process is the provision of information to the customer. Indeed, the bill itself—which is essentially a demand for payment for services rendered—provides the utility customer with a wide variety of information, such as the amount of service used (as itemized in accordance with Commission regulations), the rate charged (as fixed by the Commission) and the date on which the amount of money claimed falls due (as stated in tariff rules subject to Commission approval). It may also provide information as to procedures for disputing the accuracy of the bill, information as to procedures for making payment (*e.g.,* a return envelope may be enclosed in the billing envelope), notices of Commission proceedings, notices of rate, billing or other service changes, notices of the availability of special programs regulated by the Commission and a wide variety of additional messages, some of which may be printed on the face of the bill and some of which may be communicated on a separate insert placed in the billing envelope pursuant to an order of the Commission.

Apart from its use to facilitate the orderly satisfaction of contractual obligations between the utility and its customers, the utility billing envelope provides a "unique forum[] for expression." *Metromedia, Inc. v. City of San Diego,* 453 U.S. 490, 500 (1981). The envelope provides the means of communicating directly with the class of persons who are the utility's customers and no other. Moreover, the contents of the billing envelope

demand the recipient's close attention because they are part of, and may well affect, the ongoing business relationship between the utility and its customer.

The Commission has asserted its jurisdiction over the billing envelope as a channel of communication almost from the Commission's inception. In *Slinack v. Inglewood Water Co.*, 3 Cal.R.R.C. 752, 757 (1913), the Commission (then known as the California Railroad Commission) ordered a water company "to adopt some method of informing its patrons or consumers of water in writing of the amount of water used each month, and of the rate and amount to be paid."[12]

Similarly, in *Pacific Gas & Electric Co.*, 17 Cal.R.R.C. 143, 144, 147 (1919), the Commission approved a set of tariffs or rules and regulations, subject to such "changes and amendments as may [thereafter] appear advisable [to the Commission], requiring that "[e]ach bill for electric service will contain on its face" certain specified language.[13] Thus, as early as 1919, the Commission required PG&E to communicate specific information to its customers by what was effectively a bill insert.[14]

Indeed, from the moment the Commission began to regulate rates for utilities, a utility's bill was obliged to communicate to

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[12] The Commission similarly ruled in *Peters-Rhoades Co.*, 27 Cal.R.R.C. 297, 299 (1925), "[w]here the rates and rules of a water utility are based upon monthly payments for service, it is the duty of such a utility to render each consumer a monthly bill."

[13] The Commission commonly sets the precise terms of a tariff and orders the utility to file it. Such tariffs have the force of law. *Dyke Water Co. v. Public Utilities Commission*, 56 Cal.2d 105, 123, 14 Cal. Rptr. 310, 363 P.2d 326, *cert. denied*, 368 U.S. 939 (1961).

[14] The requirement was stated as follows, 17 Cal.R.R.C. at 147:

> "(b) *Bills*
>
> "(1) Each bill for electric service will contain on the face the following notation: 'See other side for rules regarding payment of bills, disputed bills and discontinuance of service.'
>
> "(2) Each bill for electric service will contain on the back thereof a copy of Rule and Regulation No. 6(b), No. 9(a) and No. 11."

its customers the rates *set by the Commission*. Cal. Const. art. XII, § 6; Cal. Pub. Util. Code §§ 728 and 729; App. at A57-A58.

In *Campbell Telephone Co.*, 27 Cal.R.R.C. 251 (1925), the Commission addressed the problem of the inconvenience to telephone subscribers of receiving two separate telephone bills, one for local exchange service from the Campbell Telephone Co. and one for toll service from the Pacific Telephone and Telegraph Co. The Commission concluded that "a more satisfactory relation would result both to the subscribers and applicant [the local exchange carrier] if the latter would handle the billing for toll service to its subscribers." *Id.* at 252. Thus in 1925 the Commission effectively ruled that the local company communicate through its billing process the "message," or demand for payment, of another company.[15]

And, in *Packard v. Pacific Telephone & Telegraph Co.*, 71 Cal.P.U.C. 469, 480 (1970), and *Welch v. Pacific Telephone & Telegraph Co.*, 72 Cal.P.U.C. 74, 75 (1971), the Commission required a utility to include on its bill for services a utility user's tax, the speech of the taxing municipality.

On numerous recent occasions, the Commission has regulated the billing process to ensure that appropriate rate- and service-related information reaches the customer. Such regulation has ranged from merely altering the format of the bill[16] to specifying the wording of bill inserts concerning a wide variety of subjects.[17]

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[15] The same principle applies today. Pacific Bell, the western regional Bell Operating Company, includes with its own bill the bill of AT&T Communications and/or other long distance carriers.

[16] For example, the Commission has required changes in the format of a utility bill where it concluded that the customer was entitled to fuller itemization of charges, where additional information appeared necessary to assist telephone subscribers in ascertaining whether to rent or purchase their telephones, and where a change was necessary to ensure that customers protesting a utility user's tax would not have service disconnected while pursuing such protests in the courts.

[17] Recent bill inserts ordered by the Commission have notified telephone subscribers of a lifeline program to ensure universal service in the wake of the AT&T divestiture, have indicated that elderly and

Thus the Commission has long exercised regulatory authority over the billing envelope, including the practice of enclosing bill inserts in that envelope.[18]

It is against this background that the substantiality of PG&E's First Amendment claim must be measured.

II

THE COMMISSION HAS NOT ABRIDGED PG&E's RIGHT TO SPEAK

A. The Commission's Decision Imposes No Cognizable Restriction on PG&E's Ability to Speak in the Billing Envelope; Hence No First Amendment Values Are Implicated

Consolidated Edison Co. v. Public Service Commission, supra, 447 U.S. 530, on which PG&E relies, is a very different case from this one. There, unlike here, the New York Public Service Commission had banned outright the utility's use of bill inserts which expressed opinions on controversial issues of public policy. *Id.* at 533. And there, unlike here, the restriction on the utility's speech was impermissibly content-based. *Id.* at 537. Thus the Court concluded that the state's broad prohibition of

handicapped customers may designate third parties to receive notices on their behalf to forestall the improper discontinuance of service, have announced the availability of communications devices for the deaf, have detailed in foreign languages emergency telephone numbers and dialing information, have announced the availability of water conservation devices, have provided information concerning a variety of Commission-approved weatherization and energy conservation programs, have explained the effects of certain legislation on utility rates and have explained the components of utility costs, services and rate increases.

[18] Notably, the use of bill inserts to communicate with utility ratepayers has become so commonplace that even U.S. District Judge Harold H. Greene has exercised the court's equitable powers in the AT&T divestiture case to require the inclusion of an informational bill insert. *See United States v. Western Electric Co.*, 578 F.Supp. 668, 676 (D.D.C. 1983).

The Congress of the United States has used its legislative power to that same end. *See* 16 U.S.C. § 2625(f)(2).

constitutionally protected speech was "neither a valid time, place, or manner restriction, nor a permissible subject-matter regulation, nor a narrowly drawn prohibition justified by a compelling state interest." *Id.* at 544.

Here, on the other hand, the Commission has not banned or restricted the utility's speech in any meaningful way. In granting TURN limited access to the extra space, the Commission's decision specifically states that "PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted." App. A38. Nothing in the decision prohibits PG&E from disseminating *Progress* in the billing envelope, even in the months in which access is granted to TURN, so long as it pays the additional postage costs, if any; and if envelope space is lacking, PG&E is free to expand the size of its envelope.

At the heart of PG&E's claim is its assertion that, under *Consolidated Edison,* the First Amendment confers on the utility *alone* the right to speak in the extra space of the billing envelope. But the availability of postage-prepaid space in the billing envelope is dependent on the size and weight of the envelope and the other materials enclosed in it. These factors are variable. The extra space might cease to exist entirely if legitimate billing requirements, such as the degree of itemization required on the bill or the number of bill inserts otherwise required, were modified, or if postal regulations were altered to permit incremental postage for measured fractions of an ounce. To attain its legitimate objectives, the Commission may permissibly impose such billing or other informational requirements as are consistent with its regulatory mission, even if those requirements would theoretically eliminate entirely the prepaid extra space in the envelope. *See, e.g.,* note 17, *supra.* PG&E's claim that the First Amendment renders the extra space in its billing envelope immune from reasonable regulation is simply inconsistent with its position as a regulated public utility. *See, e.g., Munn*

v. Illinois, supra, 94 U.S. at 125-130; *Sutter Butte Canal Co., supra,* 279 U.S. at 137-138.[19]

Moreover, the Commission's order here accommodates PG&E's desire to continue to disseminate *Progress* in the billing envelope and creates only a minimally intrusive, narrowly drawn limitation on the utility's prior practice. The order grants PG&E unfettered ability to disseminate *Progress* to its customers in the billing envelope each and every month of the year, limited only by the speculative possibility that it may by required to pay the cost of postage for *Progress* if TURN's use of the prepaid billing space necessitates additional postage costs for the delivery of *Progress.* Hence, the Commission's decision will at most deprive the utility, on infrequent occasions, of a "free ride"—the delivery of its viewpoint at the expense and under the involuntary subsidy of those with whom it seeks to communicate. The denial of a free ride is not a denial of free speech. *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 127; *see also Abood v. Detroit Board of Education,* 431 U.S. 209, 233-236 (1977); *Consolidated Edison, supra,* 447 U.S. at 551-555 (Blackmun, J., dissenting); *Regan v. Taxation With Representation,* 461 U.S. 540, 545-546 (1983).

If anything, *Consolidated Edison* foreordained the Commission's decision here. The majority opinion noted that "the [New York] Commission has not shown on the record before us that the presence of the bill inserts at issue would preclude the inclusion of other inserts that Consolidated Edison might be ordered lawfully to include in the billing envelope. Unlike radio or television stations broadcasting on a single frequency, multiple

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[19] As was argued to the California Supreme Court, regulation of the extra space is mandated *inter alia* by the Commission's authority to regulate rates. Cal. Pub. Util. Code §§ 728 and 729; App. A57-A58. Since the extra space has economic value measured by its ability to generate income and since the generation of such income would reduce rates, PG&E's appropriation of the extra space for its own use is equivalent to raising rates without required Commission authorization. Under its authority to regulate rates, the Commission is entitled to regulate the use of a potentially income-generating asset for the ratepayers' benefit.

bill inserts will not result in a 'cacophony of competing voices.' " 447 U.S. at 543, *quoting Red Lion Broadcasting Co. v. FCC,* 395 U.S. 367, 376 (1969).

B. The Commission's Decision Withstands "Time, Place, and Manner" Analysis

In addition, the analysis in *Consolidated Edison* leaves little doubt that the Commission's decision constitutes a "reasonable time, place, and manner" regulation which is content-neutral, serves a significant governmental interest, and leaves open ample alternative channels for communication. *Consolidated Edison, supra,* 447 U.S. at 535.

First, the Commission decision does not restrict PG&E's speech based on content. The decision states: "Currently, no controls are placed on the content of *Progress* and we will not undertake to control the material inserted by TURN." App. A22. And it further orders that "PG&E . . . shall . . . determine the content of its own material." App. A38. Thus the decision places no limitation on PG&E's ability to address any subject matter or to express any viewpoint. *Consolidated Edison, supra,* 447 U.S. at 536. And, unlike in *Consolidated Edison,* the Commission has not in any significant way "limited the means by which [the utility] may participate in the public debate on . . . controversial issues of national interest and importance." *Id.* at 535. The Commission's regulation is plainly content-neutral.

Second, the Commission's granting consumer groups access to the extra space in the billing envelope is narrowly tailored to serve several significant governmental interests. It promotes full and effective consumer participation in CPUC proceedings. App. A27, A35, A36. It enhances the accuracy of the fact-finding process by "tend[ing] to enhance the record in [such] proceedings." App. A36. It provides information about consumer organizations to those ratepayers desiring such information and furthers the fuller understanding of energy- and regulatory-related issues by consumers. App. A20-A21, A27, A36. It advances the ratepayers' state and federal constitutional rights to receive ideas and information, based on the assumption "that the ratepayers will benefit more from exposure to a variety of views

than they will from only [those] of PG&E." App. A22. It provides added protection for the particular interests of residential ratepayers and other specific ratepayer groups beyond that provided by the Commission's staff (which is charged with representing *all* ratepayers). App. A20. It limits the ratepayers' compelled subsidy of utility speech in violation of PURPA. App. A3-A4. *See Abood v. Detroit Board of Education, supra,* 431 U.S. at 235; *Consolidated Edison, supra,* 447 U.S. at 544 (Marshall, J., concurring) and 551 (Blackmun, J., dissenting). It halts PG&E's misappropriation of an asset which belongs to the ratepayers and the utility's consequent unjust enrichment. App. A4. And it promotes fair and efficient rates, the overall objective of the regulatory scheme. All of these are legitimate and significant governmental interests. *See Central Hudson Gas & Electric Corp. v. Public Service Commission,* 447 U.S. 557, 561-562, 568-569 (1980); *Consumers Lobby Against Monopolies v. Public Utilities Commission, supra,* 25 Cal.3d at 911.

Third, the Commission's decision leaves PG&E with unlimited "alternative channels of communication." 447 U.S. at 535. Every day of the year, if it so desires, PG&E may send as many copies as it pleases of *Progress* or any other publication to its customers, so long as it pays the requisite postage and other costs. Indeed, on the very day that TURN's insert is enclosed in the billing envelope, PG&E may send unlimited materials in rebuttal either in the envelope itself or under separate cover. The decision specifically provides that PG&E "may also make use of any extra space not used by TURN during the months TURN's material is inserted." App. A38. And nowhere does the decision preclude PG&E's placing such additional materials in the billing envelope as would necessitate postage costs for more than one ounce of weight, so long as PG&E bears those extra costs.

In sum, PG&E, as sole owner of its customer list, has an unlimited direct mail forum to its customers so long as it underwrites the cost of delivery. This constitutes "ample alternative channels for communication." 447 U.S. at 535.

However, consumer organizations such as TURN have no comparable channel of communication. While they may advertise in the media in ways generally available to the public, they

do not have PG&E's customer list and hence have no way of reaching *precisely* that audience of 4.2 million ratepaying bill recipients.[20] Nor do such organizations have a way of reaching that "captive" audience in a manner which demands its special attention to their message.

Moreover, as was argued to the California Supreme Court below, the ratepayers' well-recognized First Amendment and state constitutional (Cal. Const. art. I, §§ 2 and 3) rights to receive information and ideas[21] must be factored into the equation in determining whether the Commission's granting TURN access to the billing envelope violates PG&E's First Amendment rights. Leaving PG&E with exclusive access to the limited and unique forum provided by the billing envelope unquestionably burdens the ratepayers' rights to receive information and ideas

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[20] It is doubtful whether PG&E can properly disclose, or be ordered to disclose, to consumer groups the names and addresses of its customers. Cal. Const. art. I, § 1, explicitly guarantees the right of privacy to all California citizens, and only recently, in *People v. Chapman,* 36 Cal.3d 98, 113, 201 Cal.Rptr. 628, 679 P.2d 62 (1984), the California Supreme Court held that a utility customer had a reasonable expectation of privacy in unlisted information concerning his name and address, and that the warrantless disclosure of this information violated the search and seizure provisions of Cal. Const. art. I, § 13. Accordingly, the Commission's decision here appears to be the only reasonable way of providing consumer groups with access to the direct mail forum while accommodating the state constitutional privacy rights of the ratepayers. The state, of course, has a significant, if not compelling, interest, *see Widmar v. Vincent,* 454 U.S. 263, 275-276 and n. 17 (1981), in complying with its own constitution.

[21] *E.g., Lamont v. Postmaster General,* 381 U.S. 301 (1965), at 301 (opin. of the Ct.) and 308 (Brennan, J., concurring); *Board of Education v. Pico,* 457 U.S. 853, 867-868 (1982) (opin. of Brennan, J.); *CBS v. FCC,* 453 U.S. 367, 395-396 (1981); *Houchins v. KQED,* 438 U.S. 1, 30 (1978) (Stevens, J., dissenting); *Saxbe v. Washington Post,* 417 U.S. 843, 862-863 (1974) (Powell, J., dissenting); *Procunier v. Martinez,* 416 U.S. 396, 408-409 (1974); *Kleindienst v. Mandel,* 408 U.S. 753, 762-763 (1972); *Red Lion Broadcasting Co. v. FCC, supra,* 395 U.S. at 390; *Stanley v. Georgia,* 394 U.S. 557, 564 (1969); *Martin v. Struthers,* 319 U.S. 141, 143 (1943).

from the competing viewpoints of the very organizations representing a substantial number of those ratepayers in Commission proceedings. On the other hand, granting reasonable access to speakers such as TURN accommodates the First Amendment and state constitutional rights both of PG&E and the ratepayers while taking into account the limited scope of the billing envelope forum and the purpose it serves.[22]

By granting TURN access to the extra space in the billing envelope four times a year, the Commission has plainly adopted a reasonable time, place, and manner regulation narrowly tailored to serve a significant governmental interest and leaving PG&E ample alternative channels for communication. *E.g., Perry Education Assn. v. Perry Local Educators' Assn., supra,* 460 U.S. at 45; *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. at 132; *Consolidated Edison, supra,* 447 U.S. at 535-536.

C. The Commission's Decision Constitutes Permissible Regulation of a Nonpublic Forum

However, the traditional "time, place, and manner" test, though plainly satisfied by the Commission's decision, may actually be more stringent than the test applicable here because the extra space in the billing envelope is not, nor has the Commission ever treated it as, an unlimited "public forum." The extra space is a nonpublic forum over which the Commission, by its broad regulatory powers, has "the right to make distinctions in access on the basis of subject matter and speaker identity." *Perry, supra,* 460 U.S. at 49. "These distinctions may be impermissible in a public forum but are inherent and inescapable in the process of limiting a nonpublic forum to activities compatible with the intended purpose of the property. The touchstone for evaluating these distinctions is whether they are reasonable in light of the purpose which the forum at issue serves." *Id.* (footnote omitted). Thus in *Perry* this Court upheld a school policy permitting access to teachers' mailboxes for a union elected by teachers as their exclusive bargaining representative

[22] The state's interest in accommodating the First Amendment and state constitutional rights of its citizens is "compelling." *Widmar v. Vincent, supra,* 454 U.S. at 271, 275-276 and n. 17.

but denying access to a rival union because the policy distinguished between the two unions based on their status rather than their views. *Id.* at 53.[23]

Of course *Perry* involved property owned by the government which was a nonpublic forum. If the extra space is instead deemed private property subject to broad governmental supervision and control, the most apt analogy may be provided by *U.S. Postal Service v. Greenburgh Civic Assns., supra,* 453 U.S. 114. There a federal statute provided that a citizen's privately-owned mail receptacle regulated by the U.S. Postal Service not be used for the delivery of mailable matter on which postage had not been paid. This Court, noting that no person is required to provide a mailbox, observed that "[w]hat the legislation and regulations do require is that those persons who *do* wish to receive and deposit their mail at their home or business do so under the direction and control of the Postal Service." *Id.* at 126 (emphasis in original). Eschewing the "time, place, and manner" analysis applied to traditional "public forums", *id.* at 132, the Court concluded that the governmentally-imposed postage requirement for the use of privately-owned mailboxes was permissible simply because it was "both reasonable and content-neutral." *Id.* at 131 n. 7 and 133.[24]

[23] Neither the majority opinion in *Perry* nor Justice Brennan's dissent, in which three other Justices joined, mandates a different result here. The Commission's decision involves no viewpoint discrimination and in this case no party requesting access has been excluded. 460 U.S. at 64 (Brennan, J., dissenting). Moreover, Justice Brennan acknowledges that distinctions in access based on "speaker identity" may be permissible where access is restricted to those involved in the "official business" of the particular governmental agency. 460 U.S. at 61 n. 5, 64 n. 8. Any restriction in speaker access perceived in the Commission's decision would plainly satisfy that standard.

[24] "Public property which is not by tradition or designation a forum for public communication may be reserved by the state 'for its intended purposes, communicative or otherwise, as long as the regulation on speech is reasonable and not an effort to suppress expression merely because public officials oppose the speaker's view.' " *City Council v.*

Similarly here, when a corporation enters into the business of providing gas and electric service to the California public as a regulated monopoly and receives the state's assurance of an opportunity to earn a reasonable rate of return, its practices and property become subject to the Commission's jurisdiction. Cal. Pub. Util. Code §§ 701, 728, 729, 761 and 762; App. A57-A59. *See Munn v. Illinois, supra,* 94 U.S. at 126-130; *Nebbia v. New York, supra,* 291 U.S. at 532-539; *Sutter Butte Canal Co., supra,* 279 U.S. at 138. Under *Greenburgh,* the Commission's reasonable and content-neutral regulation of the extra space in the billing envelope withstands First Amendment scrutiny.

In sum, the Commission's decision in no way abridges PG&E's right to speak in the billing envelope. The sole limitation on PG&E's speech is the speculative possibility that the utility may on infrequent occasions be required to bear the cost of delivering its message through the United States mail. This possibility does not implicate First Amendment values. Accordingly, PG&E has failed in its "obligation . . . to demonstrate that the First Amendment even applies." *See Community for Creative Non-Violence, supra,* ____ U.S. at ____ n. 5, 82 L.Ed.2d at 227 n. 5, 104 S.Ct. at 3069 n. 5.

Nevertheless, the decision satisfies First Amendment standards. Although it plainly withstands traditional "time, place, and manner" scrutiny, this is not a "public forum" case. Instead, it is a case involving a nonpublic forum on property "owned or controlled by the government." *Greenburgh, supra,* 453 U.S. at 132. Accordingly, under *Perry* and *Greenburgh,* the decision is justified because any restriction it imposes on PG&E's speech is content-neutral and reasonable. PG&E's claim must therefore be deemed insubstantial.

Taxpayers for Vincent, ____ U.S. ____, 80 L.Ed.2d 772, 793, 104 S.Ct. 2118, 2134 (1984), *quoting Perry, supra,* 460 U.S. at 46.

III

THE COMMISSION HAS NOT ABRIDGED PG&E's RIGHTS TO REFRAIN FROM SPEAKING OR TO REFRAIN FROM ASSOCIATING WITH THE VIEWS OF ANOTHER

The claimed violations of PG&E's First Amendment rights to refrain from speaking and to refrain from associating with the views of another are similarly insubstantial and should be summarily rejected based on the analysis in *PruneYard v. Robins, supra,* 447 U.S. at 85-88.

In *PruneYard* the private owner of a shopping center sought to exclude persons distributing pamphlets from his property, contending that he had "a First Amendment right not to be forced by the State to use his property as a forum for the speech of others." 447 U.S. at 85 (footnote omitted). This Court rejected the claim, concluding that a state may exercise its police power to adopt reasonable restrictions on private property without violating the First Amendment so long as the views of those distributing pamphlets were not likely to be identified with the views of the owner, the state had dictated no particular message to be distributed, and the owner was free to disassociate himself from the views of the speakers. *Id.* at 85-88. These established principles are applicable here and warrant summary dismissal of PG&E's appeal.[25]

The cases on which PG&E relies, *Miami Herald Publishing Co. v. Tornillo,* 418 U.S. 241 (1974); *Wooley v. Maynard,* 430 U.S. 705 (1977); and *Abood v. Detroit Board of Education, supra,* 431 U.S. 209, are inapposite. Unlike *Tornillo,* the Commission's decision involves no "intrusion into the function of the editors" of *Progress.* 418 U.S. at 258. And rather than "dampen[ing] the vigor and limit[ing] the variety of public debate," *id.* at 257, the Commission's decision here can only encourage it.

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[25] Indeed, here the forum to which TURN has been granted access is situated on ratepayer property, not that of PG&E. *A fortiori,* the utility's claim must be rejected under *PruneYard.*

Moreover, unlike *Maynard*, the decision here leaves PG&E free to "expressly disavow any connection with [TURN's] message," *PruneYard, supra*, 447 U.S. at 87, by placing disclaimers either on its bill, in an additional insert, in *Progress*, in a separate mailing or anywhere else it chooses. And since the decision itself requires that "[a]ll of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E," App. A39, it is clear that TURN's views "will not likely be identified with those of [PG&E]," 447 U.S. at 87.

Nor is PG&E being required "to contribute to the support of an ideological cause [it] may oppose" in violation of the principle of *Abood, supra*, 431 U.S. at 235. The Commission's decision provides that "[c]osts of inserting materials in the extra space shall be borne by the sponsor of the materials [and] PG&E shall bill TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials." App. A38-A39. Moreover, the postage costs attributable to the extra space are paid by the ratepayers, not PG&E.[26]

The Commission's decision does not violate PG&E's First Amendment rights.

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[26] If anything, it is PG&E that is violating the rights of the ratepayers to refrain from disseminating and associating with the utility's views by appropriating the ratepayers' involuntary subsidy of its speech. *See Consolidated Edison, supra*, 447 U.S. at 544 (Marshall, J., concurring) and 551 (Blackmun, J., dissenting).

CONCLUSION

For the reasons stated, the Court should dismiss the appeal for want of a substantial federal question.

Respectfully submitted,

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The Public Utilities
Commission of the
State of California

March 1, 1985

(Appendices follow)

Appendix A

[Conformed copy of Decision No. 83-12-047 (Filed December 20, 1983), as modified by Decision No. 84-05-039 (Filed May 2, 1984)] *

DECISION 83-12-047 DECEMBER 20, 1983
BEFORE THE PUBLIC UTILITIES COMMISSION
OF THE STATE OF CALIFORNIA

TOWARD UTILITY RATE NORMALIZATION, a Non-Profit California Corporation, *Complainant,* vs. PACIFIC GAS & ELECTRIC COMPANY, a Corporation, *Defendant.*	Case 83-05-13 (Filed May 31, 1983)

ROBERT SPERTUS, MICHAEL PETER FLORIO, and JOHN F. ELLIOTT, *Attorneys at Law* and SYLVIA M. SIEGEL, *for complainant.*

PETER W. HANSCHEN, ROBERT HARRIS, and SHIRLEY WOO, *Attorneys at Law, for defendant.*

WILLIAM L. KNECHT, *Attorney at Law, for California Association of Utility Shareholders;* and ETHAN SCHULMAN and HARVEY ROSENFELD, *Attorneys at Law, for Center for Law in the Public Interest, intervenors.*

DIANE I. FELLMAN, *Attorney at Law, for the Commission staff.*

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* [Although the Appendix to the Jurisdictional Statement contains both Decision No. 83-12-047 (J.S. App., at A1-A34) and the modifying passages of Decision No. 84-05-039 (J.S. App., at A45-A54), the presentation of the two majority opinions in a single opinion *as modified* greatly facilitates reading the Commission's decision. For the convenience of the Court, the Commission hereby submits a single conformed copy of its majority opinion in Decision No. 83-12-047, as modified by Decision No. 84-05-039. The concurring and dissenting opinions follow the conformed majority opinion.]

OPINION

Summary

By this decision the Commission grants, in modified form, the complaint of Toward Utility Rate Normalization (TURN) proposing access to the extra space in Pacific Gas and Electric Company's (PG&E) billing envelope by consumer representative organizations for the purpose of soliciting funds to be used for residential ratepayer representation in proceedings of this Commission involving PG&E.

The decision addresses the effect of prior Commission determinations on the ownership of the billing envelope extra space; procedural issues raised by the parties; jurisdictional attacks on the Commission's authority to grant the relief requested, including constitutional issues; and the merits of the proposal.

Introduction

The parties and subject matter of this case are not new to us. The issue was first raised by TURN as an intervenor in the proceedings of the rate application filed by PG&E in late 1980 (Application 60153). In those proceedings TURN argued, among other things, that this Commission should find PG&E's inclusion of its publication, *Progress*, in the customers' billing envelopes to be improper because it violated the advertising standards of the Public Utility Regulatory Procedures Act of 1978 (PURPA), 16 U.S.C. Section 2601, et seq., by which PG&E was bound.[1] At the time TURN's primary concern was not how the billing envelope space should be used but preventing PG&E from using it in a way TURN believed to be illegal.

In developing its argument on this point TURN suggested certain possible legal bases for this Commission's controlling

[1] The relevant PURPA sections prohibit a utility from recovering from its ratepayers any direct or indirect expenditure for political advertising.

such envelope use. One was for the commission to restrict PG&E's use based on a finding that the envelope was ratepayer property—an idea first propounded by Justice Blackmun in his dissent in *Consolidated Edison Co. v. Public Service Commission* (1979) 447 US 530, 534, N.1. (*Con Ed*).

In our decision on the application, Decision (D.) 93887 issued December 30, 1981 (as modified by D.82-03-047 issued March 2, 1982), we concluded that, as TURN asserted, we had adopted the PURPA political advertising standards, that PG&E was bound by them, and that PG&E had engaged in political advertising in the *Progress* from time to time in violation of the PURPA prohibitions. We did not adopt the idea that the envelope itself is ratepayer property, as TURN suggested. However, we did find that the "extra space" in the billing envelope is ratepayer property. (D.93887 as modified, Finding of Fact 58, p.220.) We defined extra space as the space remaining in the billing envelope, after inclusion of the monthly bill and any required legal notices, for inclusion of other materials up to such total envelope weight as would not result in any additional postage cost.

Our conclusion concerning the ownership of the extra space resulted from our analysis of the unique factors which allow this issue to exist. It was clear then as it is now that envelope and postage costs and any other costs of mailing bills are a necessary part of providing utility service to the customer, so the costs are a legitimate revenue requirement which we should, and do, permit PG&E to include in the rates it collects from ratepayers. However, due to the nature of postal rates (which are assessed in increments of one ounce) extra space exists in these billing envelopes. If we regarded that extra space as the property of PG&E, then the result would be that along with PG&E's legitimate cost of mailing it would also be entitled to profit from

the economic value of that extra space.[2] Such a result is inequitable because it provides PG&E with a benefit beyond the mailing expense legitimately recoverable from the ratepayers. Mindful that the extra space is an artifact generated with ratepayer funds, and is not an intended or necessary item of rate base, and that the only alternative treatment would unjustly enrich PG&E and simultaneously deprive the ratepayers of the value of that space, we concluded that the extra space in the billing envelope "is properly considered as ratepayer property." (D.93887, Finding of Fact 58, p.220.)

We reiterated our view that such a conclusion was mandated by the equities of the situation when, in our decision in *Center for Public Interest Law and Robert L. Simmons v. San Diego Gas & Electric Company*, D.83-04-020 decided April 6, 1983,[3] we stated:

> "We have stated that the extra space belongs to the ratepayers. In so doing, we are not so much describing a traditional property right as an equity right. . . . we are saying that the *reason* the ratepayers pay for the billing envelopes and postage is that those costs are an expense necessary to the operation of the utility. So, what the ratepayers are legitimately paying for is the conveyance of their bills and occasional legally mandated notices. Since these documents

[2] As we stated in D.93887, there is no question that this space has value. Quantification of that value, though, is necessarily subjective and imprecise since it is dependent on a number of variables such as the nature of the insert, the identity of the beneficiary or beneficiaries of the communication and some alternative means of conveying the same information to the same people. It may also include such intangibles as the aura of goodwill created around the proponent of the message or some other party, and the increased probability that the recipient will peruse a communication enclosed with a bill over one sent separately.

[3] This case is also known as the "UCAN" case because it proposed establishment of the Utility Consumers Action Network or UCAN.

> together do not generally add up to one ounce . . . the ratepayer has paid for some empty space . . . " (P.14.)

In the present matter TURN has filed a complaint against PG&E for not permitting access to the extra space in its billing envelopes by intervenors for the purpose of soliciting voluntary donations to be used to represent residential ratepayers in Commission proceedings involving PG&E. This complaint is a response to the invitation we made in D.93887:

> ". . . We invite TURN or any other interested party to file a complaint with this Commission with a proposed solution to this 'extra' space problem. The complaint would seek an order from us to the utilities, such as PG&E, that they utilize the economic value of the 'extra space' more efficiently for the ratepayers' benefit. We caution, however, that we will not lightly adopt such an order and that the considerable First Amendment problems must be fully addressed in such complaint." (P.159(g) as modified.)

TURN's complaint lists three alternative "Consumer Advocacy Checkoff" proposals. Each alternative proposal calls for a billing envelope extra space insert, as a two-year experiment, which (1) explains the program, (2) sets forth a list of pending and anticipated PG&E applications and other cases likely to have a significant effect on customers' rates and services, and (3) invites voluntary donations to support advocacy by consumer organizations (identified on a check-off list by name, address, and date of incorporation) on behalf of PG&E's residential customers before the Commission. The insert would also include a return envelope for mailing donations to a central collection point for transmittal to the organization or organizations checked off on the list.

The alternatives differ from one another in the following specifics:

a. Proposal 1 would require the Commission or its designated representative, such as the Public Advisor, to

produce and write the insert. Donations would be sent to the care of the Public Advisor organizations.

b. Proposal 2 is the same as Proposal 1 except that the functions assigned to the Commission or its designated representative would be performed by or under the supervision of a "blue ribbon" panel appointed by the Commission with the assistance of its Public Advisor.

c. Proposal 3 would allow only TURN to solicit donations by way of an insert, similar in format to the others, but prepared by TURN.

A prehearing conference was held on this matter before Administrative Law Judge (ALJ) Baer on August 9, 1983 in the Commission's Courtroom in San Francisco. A hearing was held in the same place before ALJ Colgan on September 12 through 15, 1983. The right to intervene was requested by two parties: the California Association of Utility Shareholders (CAUS) and the California Public Interest Research Group (Cal PIRG). Both were granted. Only CAUS actually participated in the hearing or filed briefs. The Commission Staff through the Legal Division participated by cross-examining witnesses and filing briefs.

The matter was submitted on September 15, pending receipt of one late-filed exhibit on September 21, 1983, simultaneous closing briefs due September 28, 1983 and simultaneous reply briefs due October 4, 1983.

While our previous decisions on this subject have concluded that the extra space is the property of ratepayers, we should point out that our jurisdiction over the extra space does not depend solely or entirely on a determination of the ownership of the extra space or the exact nature of a property right in such space.

The extra space in the billing envelope is a byproduct of an activity essential to the operation of the regulated utility—billing. Since billing is an essential and proper function of a regulated utility, this Commission has allowed the utility to

recover its reasonable expenses—postage, materials, labor, overhead—from ratepayers. The existence of the extra space is a direct consequence of the act of billing for utility services and the way in which postal costs are assessed.

Because the billing space is so inextricably related to activities subject to routine regulation, we have repeatedly exercised our authority under the State Constitution and Public Utilities Code Section 701 to permit and require the space to be used for the benefit of ratepayers. The billing space has frequently been put to the obvious use of communicating with ratepayers. Recently, we have also solicited proposals that would allow ratepayers to benefit from the economic value of the extra space. (D.93887)

Use of the billing space to accomplish various informative functions for the benefit of ratepayers now occurs so frequently that it had become a routine matter. Notices of applications for rate increases and notices of public hearings are regularly inserted without objection in billing envelopes (see, Resolution ALJ-149, October 20, 1982, p. 3.)—so routinely, in fact, that we have referred to extra space as being that space which is available *after* legal notices and, of course, the bills and return envelopes have been included. These notices have been included in billings precisely because the billing envelope is such an effective method of communicating with ratepayers. We have also required utilities to include notices of the availability of various conservation programs (D.92653) and conservation information (D.89316). We have required our utilities to include an insert informing ratepayers of the effects of a complicated federal tax law (D.93887). And most recently, we have used the billing space of telephone utilities to notify customers of a new lifeline program designed to assist low-income people to remain on the telephone system in the wake of the divestiture of AT&T.(D.84-04-053.) All of these are examples of the proper use of a valuable means of communication that the extra space provides.

We have also permitted the utilities to use this extra space to communicate with ratepayers. Subject to our general oversight (e.g. P.U. Code Section 453 (c), (d)), utilities have used this space to inform customers of ways to reduce energy consumption, of the availability of special programs, of how to resolve problems with the utility's service, and of other topics. When a utility has used the extra space to engage in political advertising, we expressed our concern that ratepayers should not be required to bear any portion of the direct or indirect expense connected with such advertising. (D.93887.)

Other uses of the extra space are certainly possible. TURN has presented evidence in an earlier case that a utility in another state has sold the extra space for commercial advertising unrelated the utility's business and used the resulting revenues to reduce rates to customers.

Viewed in this general context, it appears to us that the issue raised by TURN's complaint is *not* whether the Commission may exert its authority over the billing space. As the previously stated examples demonstrate, the Commission has repeatedly, and we think properly, required the billing space to be used for the benefit of ratepayers. As we mentioned previously, this power has been exercised so routinely that we have defined "extra space" as excluding the space occupied by notices required by the Commission. The question raised by TURN's complaint, then, is whether TURN has presented a proposal for use of the billing space that is sufficiently beneficial to ratepayers for us to order implementation of the proposal. See, D.93887, mimeo, p. 157g, as modified. For reasons discussed in this decision, we are persuaded that TURN had presented such a proposal.

Effect of Prior Decision

The ordering paragraphs in D.93887 did not address the extra space issue. PG&E's position is that our statements in D.93887 about the extra space are *dicta* because our discussion of ownership of the envelope space did not address third party access but

was only for the limited purpose of "explaining that a value can be assessed to the 'extra' space" in the context of our determination of whether a PURPA violation existed. Therefore, PG&E concludes our statements in D.93887 about the extra space are not subject to the rules of collateral estoppel or to Public Utilities (PU) Code Section 1709 which states:

> "In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."

We need not decide this issue to arrive at a proper disposition or TURN's complaint. Whether or not the rules of collateral estoppel apply to our findings and statements in D.93887 as to the ownership of the extra space, those findings and statements were made after a full hearing and opportunity to brief the issues. PG&E has not persuaded us that there is any reason to relitigate those questions at this juncture and we shall not do so. We consider findings of fact 58, 58(a), 59 and 60 of D.93887 as being final for purpose of this proceeding.

Disputed Evidence

PG&E Survey

The effect of D.93887 is also important in dealing with an evidentiary matter which arose during the hearing when PG&E attempted to offer a document of over 100 pages (marked Exhibit 12) entitled "Progress: A Readership Study."

According to PG&E's offer of proof, the document would have shown that "Progress is a useful and efficient use of the billing space, that it is a valued publication received by the ratepayers, and that it has an effective conservation measure [sic] to be presented." (RT 597-598.) Counsel for PG&E also claimed that the document would be useful to the Commission as a basis for determining who would use the billing envelope more efficiently and effectively (generally RT 585-599). In conjunction with this exhibit, PG&E also offered questions and answers 10 through 17

of the prepared testimony of its witness, Gerald W. Sword (marked as Exhibit 11).

Counsel for TURN objected to the admission of both documents on the ground of relevancy and as improper rebuttal testimony. The objection was sustained as to both documents by the ALJ.

In its opening brief PG&E again argues that these documents properly rebut the second sentence of paragraph 11 of the complaint, which states:

> "Therefore, this use of the extra space in the PG&E billing envelope is a more effective use of the economic value of that space than that provided by the existing alternatives, i.e., the dissemination of the 'PG&E Progress' and/or the non-use of the extra space."

PG&E also argues that the ALJ's ruling, which relied on the impropriety of the evidence as rebuttal, applied the rules of evidence and procedure "so egregiously as to deny PG&E procedural due process". (PG&E's Concurrent Opening Brief, p.16.) As a consequence PG&E requests the Commission to reopen the proceeding and accept the complete testimony of Gerald W. Sword and the study. We decline to do that. The ALJ's ruling on these two documents was proper.

PG&E's argument implies that it is necessary or appropriate to weigh the "value" of inclusion of the *Progress*—as measured by ratepayer perception—against whatever other use might be proposed for the extra space—apparently as measured by the same yardstick. In so arguing, PG&E ignores the fact that we laid that issue to rest in D.93887. We said:

> "Use of the space for the *Progress* instead of some other purposes deprives the ratepayers of that 'value' which they own." (P.159b.)

Thus, while in Finding of Fact 60 of D.93887 we stated that the "most efficient means of capturing for ratepayers' benefit the

full economic value of the extra space remains to be determined in a future proceeding," we made that statement in the added context of having determined that the extra space belongs to the ratepayers.

It was not our intent then, nor is it now, to involve ourselves in judging the relative merit of the speech of different factions. "It is not the content [of the *Progress*] that we are concerned with," we stated in D.93887 (p.159d).

By our statement in Finding of Fact 60 we intended to suggest to future complainants that we needed more information in order to decide in a constitutionally equitable and practical manner how to neutrally determine who should have access to the extra space and how such access should be apportioned.

Therefore, any evidence proffered for the purpose of establishing the perceived merit of the content of the *Progress* is irrelevant to this proceeding and was properly excluded.

Thomas C. Long's Testimony

PG&E also offered testimony of Long (Exhibit 10). TURN objected to the admission of questions and answers 5 and 6 and Table 1, and staff joined that objection and also objected to the relevance of questions and answers 7 and 8. After a great deal of oral argument the ALJ took the objections under submission pending receipt of written argument. Examination and cross-examination proceeded as if the testimony had been received.

As counsel for PG&E explained, questions and answers 5 and 6 and Table 1 are for the purpose of showing that the revenue requirement which has been allowed for bill mailing expenses has not been sufficient to cover actual costs due to postage increases in the last several years. We find this evidence is relevant to the jurisdictional issues raised by PG&E and questions and answers 5 and 6 and Table 1 will be received. Question 7 appears to be addressed to the expertise of this witness; however, part of that answer and all of question and answer 8 go to opinion outside

Long's area of expertise. Nonetheless, due to the nature of the inquiry and the extensive cross-examination which took place on these items, we think it inappropriate to delete these questions and answers since it would require a fruitless exercise in determining which part of Long's lengthy cross-and redirect-examination should also be stricken.

Long testified that amounts authorized to be collected for mailing expenses were not sufficient to cover actual costs during certain periods of time between 1971 and 1981 because postage rates rose. He concluded that since PG&E is responsible for bill mailing expense even if rates are inadequate to cover it during the future test year, PG&E "is vested with cost responsibility". This testimony does not alter our opinion regarding ownership of the extra space. Variation between amounts adopted for ratemaking and actual expenses is inevitable in test year ratemaking. It has clearly been this Commission's policy to include in rates an amount sufficient to cover all reasonable bill mailing expense. The fact that in hindsight these amounts did not precisely reflect PG&E's actual expenditures for postage during certain periods of time does not justify treating the extra billing envelope space as the property of the utility rather than of the ratepayers. Nor does this fact change our conclusion regarding this Commission's power to regulate the billing space as part of our overall regulatory authority.

Motions to Dismiss

In addition to the substantive constitutional grounds which we address elsewhere, PG&E has also moved to dismiss the complaint on a number of procedural bases, which are discussed below.

a. Failure to Follow the Commission's Directive in D.93887 to Discuss the First Amendment in the Complaint.

Pointing to our invitation to parties in D.93887 to file a complaint about matters such as this one, and specifically noting our statement that "the considerable First Amendment problems

must be fully addressed in such complaint", PG&E contends TURN's complaint should be dismissed because the complaint itself does not address the First Amendment. PG&E assumes that that is what we meant to require by our statement in D.93887. While our statement might have been more artfully worded, we certainly did not intend to depart from our established practice by requiring legal argument to be part of a complaint. The complaint merely *alleges* the activity or practice which complainant believes to be improper. Legal principles applicable to the allegations are set forth in briefs or oral argument after the facts have been elicited in a hearing.

Our statement about the First Amendment was merely meant to alert any future litigants on this issue that we would not adopt any proposal unless the proceeding instigated by the complaint presented us with a record which fully addressed the First Amendment problems which such a proposal might raise. In this case, the First Amendment problems were first addressed by PG&E in its Motion to Dismiss filed prior to the hearing. The First Amendment issues were addressed further in the parties' responses to PG&E's motion and in their opening and closing briefs. Since the First Amendment problems have been fully addressed as required by D.93887, we will reject the motion to dismiss on this procedural basis.

b. *Failure to State a Cause of Action*

PG&E states that the complaint does not set forth "any act or thing done by any public utility . . . in violation or claimed to be in violation, of any provision of law or of any order or rule of the commission . . . " as required by PU Code Section 1702, the complaint provision.

While this matter may seem to fall between the cracks when PU Code Section 1702 is applied to the facts alleged, there is a broader mandate applicable here. PU Code Section 705 states:

> "Whenever in Articles 2, 3, and 4 of this chapter a hearing by the commission is required, the hearing may be had either upon complaint or upon motion of the commission."

Such a hearing is a prerequisite to our determining whether a utility's practices are "unjust, unreasonable, unsafe, improper, inadequate, or insufficient." Based on that we then, by order or rule, fix the practices to be followed. See PU Code Section 761 (Article 3). PU Code Section 728 (Article 2), which gives us the right to "determine and fix, by order, the just, reasonable, or sufficient . . . practices . . ." to be observed should we find a utility's practices affecting rates to be "insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential . . . ," also requires a hearing.

Thus, we conclude that a complaint alleging unjust or improper practices as was filed here complies fully with statutory requirements and we will deny the motions to dismiss based on that ground.

c. *Failure to Sign Complaint*

PG&E also notes that TURN's complaint in this matter was not signed as required by Rule 4 of our Rules of Practice and Procedure (Title 20, California Administrative Code, Section 4). While this is apparently accurate, it was not noticed by our Docket Office at the time of filing. If it had been, it would have been rejected until remedied. The matter was in hearing before this technical issue arose.

The prepared testimony of the two witnesses for TURN together sponsors each allegation of the complaint. Sylvia Siegel, executive director, and Michel Peter Florio, attorney, testified extensively under oath on both direct- and cross-examination.

The purpose of Rule 4 is to guard against frivolous vexatious, harassing filings by requiring the responsible parties to attest to the allegations.

As a result of Siegel's and Florio's testimony, all the allegations have been attested to and the purpose of Rule 4 has been served. Thus we think it appropriate to invoke the equitable consideration authorized by Rule 87 which, in pertinent part, states:

> "These rules shall be liberally construed to secure just, speedy, and inexpensive determination of the issues presented. In special cases and for good cause shown, the Commission may permit deviations from the rules. . . ."

Other Jurisdictional Claims

a. *The Dedication Issue*

CAUS takes the position that this Commission may not order PG&E to allow others to use billing envelope space because PG&E has not dedicated that space to public use. Since the space has not been so dedicated, CAUS asserts, the Commission lacks jurisdiction to grant the relief sought. To support this position CAUS cites our decision in *Holocard v. PT&T et al.* (1981) 6 CPUC 2d 649 as corrected by D.92980; modified and rehearing denied by D.93362 (1981). *Holocard* is clearly inapposite to the present matter. That case involved a proposed business (Holocard) seeking an order requiring the utility to participate in the operation of the business to the extent of billing Holocard's customers, on Holocard's behalf. In rejecting Holocard's claim we discussed the traditional principle of dedication of utility property to public service which we have relied upon over the years. Obviously, however, where the property in question (the extra space) belongs to the ratepayer, this principle cannot be applied.

Furthermore, all the dedication cases have in common an attempt to require the utility to commence some new service. As TURN properly points out, "[t]his proceeding simply does not present a dedication question, because TURN is not requesting a new public utility service." (TURN reply brief p.33.)

TURN proposes that we order PG&E to refrain from exercising exclusive control over the extra space so that TURN and perhaps some other entities may have access to it. This is not equivalent to new utility service, it is merely a proposal for more efficient use of existing service. Such Commission action is certainly within the ambit of our statutory authority and consistent with our normal regulation of the billing process.

b. *Management Prerogative*

As both CAUS and PG&E note in their post-hearing briefs, the value of utility property that has been rented to others (e.g. pole space or office space) can be credited by the Commission against revenue requirements in rate setting proceedings. PG&E additionally points out that we may not, consistent with the rule set forth in *Pacific Telephone and Telegraph Co. v. Public Utilities Commission* (1950) 34 C 2d 822, and other earlier cases, interfere with actual management decisions regarding the activities themselves. Whatever validity this argument still may have (see *General Telephone Co. v. P.U.C.* (1983) 34 Cal.3d 817), it does not pertain to property not belonging to the utility.

Furthermore, as the case above makes clear, "[t]he primary purpose of the Public Utilities Act [citations omitted] is to insure the public adequate service at reasonable rates without discrimination." 34 C 2d 822, 826. A practice which recoups the economic value of the extra space for PG&E in addition to recouping the costs of mailing discriminates against the ratepayers since it would be impossible for this Commission to credit any amount certain against revenue requirement because the value of the space might fluctuate from message to message, time to time, and customer to customer, as described in footnote 2, supra. Therefore, we reject the claim of PG&E and CAUS that we lack jurisdiction over the present matter because it constitutes improper interference with a proper management prerogative.

Relative to this management prerogative argument PG&E suggests that even if the billing envelope were public property,

the case law still permits PG&E to deny access to third parties. However, in citing *Danskin v. San Diego Unified School District* (1946) 28 C 2d 536; *Adderley v. Florida* (1966) 385 US 39, 17 L ed 2d 559; and *Lehman v City of Shaker Heights, et al.* (1973) 418 US 298, 41 L ed 2d 770, PG&E misses the crucial point that it is the governmental entity in charge of the public facility which has the prerogative, under certain circumstances, to restrict access to the facility. Presumably, under this line of cases, if we had determined that the billing envelope was public property, which we have not, it would then be the Commission which had the authority to determine how access could be restricted. The conclusion that such authority would rest with PG&E is not supported by these cases.

The Nature of TURN

Both PG&E and CAUS argue that even if the Commission does have the right to order PG&E to make this extra space available to others, allowing TURN such access would still be improper because TURN is not a democratically instituted organization, it is not consumer-controlled, it does not represent a clearly defined class, its claims about whom it represents are inaccurate and overstated, and it has demonstrated that it cannot be trusted to clearly and accurately describe its past role in rate proceedings.

TURN's complaint describes the organization as a

> "... non-profit California corporation ... [which] represents the interests of residential utility consumers generally, as well as specific consumer organizations and constituencies, such as the statewide Consumer Federation of California, a federation of approximately one hundred organizations; the Consumers Cooperative of Berkeley, with a membership of approximately 90,000 families; San Francisco Consumer Action; the California Legislative Council for Older Americans; the California Gray Panthers and other organizations and individuals."

It is correct that TURN is not a membership organization with voting members who decide its policies. The testimony of TURN's executive director, Sylvia Siegel, illustrated that the organization is funded by donations and some grant funds (as well as some PURPA awards[4] granted by this Commission). The organization's policy, however, is set by a board of directors which is comprised of representatives from at least five of the consumer organizations mentioned above.

Siegel's testimony made it clear that while there is certainly no uniformity of interests among ratepayers—even among residential ratepayers whom this proposal specifically addresses—there are many positions which TURN takes regarding PG&E that would be shared by substantially all such ratepayers. These include, she testified, a desire to keep rate of return and evaluation of rate base relatively low. As to issues such as rate design and energy conservation subsidies, Siegel testified that TURN takes positions consistent with the policy its board of directors adopts. So, for example, TURN opposed the ZIP and RCS[5] programs in Commission proceedings because TURN took the position that the programs were subsidized by the nonparticipants—primarily low-income, elderly, and renters. Obviously some residential ratepayers liked these programs; however, it

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[4] The Commission has adopted rules (see California Administrative Code, Title 20, Section 76.01 et seq.) pursuant to PURPA, the Public Utility Regulatory Act of 1978, which provide for the award of reasonable attorneys' fees, expert witness fees, and other reasonable costs to consumer participants in certain hearings involving electric utilities. In order to be eligible for such award the consumer must demonstrate, among other things, significant financial hardship. TURN has received such awards within the past two years, most recently in D.83-05-048 issued May 18, 1983.

[5] ZIP or Zero Interest Program and RCS or Residential Conservation Service are programs under which the utility made no-interest loans to ratepayers for certain home conservation devices and conducted free energy conservation audits of ratepayers' homes.

must be acknowledged that TURN's position represented the interests of a significant group of such ratepayers.

We are unpersuaded by arguments that TURN's claims about itself are so inaccurate as to cast doubt on its veracity. TURN has demonstrated in its testimony and in past participation in proceedings before this Commission an ability to represent the interests of a substantial segment of the PG&E residential ratepayer population. It has also demonstrated that it is a properly constituted nonprofit California corporation, and that it is presently involved in Commission proceedings involving PG&E. Furthermore, it has adequately demonstrated during this hearing that it cannot participate in all the regulatory proceedings of PG&E it might otherwise participate in without significant financial hardship.

Merits of TURN's Proposals

As noted above, TURN proposes that the extra space in the billing envelope be used in one of three ways. PG&E and CAUS oppose all of TURN's proposals on the grounds that they are unworkable and ill-conceived. Our Legal Division supports TURN's complaint and recommends that we adopt proposal 3. It believes the proposals 1 and 2 would require excessive Commission involvement and that there is insufficient evidence to adopt these proposals at this time.

Before addressing the merits of TURN's proposals, we note that in other decisions we have recognized the value of effective participation by consumer organizations in Commission proceedings. Further, in our UCAN decision, we specifically recognized how space in a utility billing envelope could be used to allow a consumer organization to communicate with the ratepaying public and solicit voluntary contributions to support ratepayer participation. We stated:

> "There is no question that participation by representatives of consumer groups tends to enhance the record in our proceedings. The California Supreme Court reminded us of

that in deciding *Consumers' Lobby Against Monopolies (CLAM) v Public Utilities Commission* (1979) 25 C 3d 891 which found that the Commission has jurisdiction to award attorney's fees and costs to consumer representatives under certain circumstances. In reaching this conclusion, the Court noted:

> '[T]he staff is subject to institutional pressures that can create conflicts of interest; and it is circumscribed by significant statutory limitations, such as lack of standing to seek either rehearing (Pub. Util. Code Section 1731) or judicial review (Id., Section 1756) of Commission decisions.' (25 C 3d 891, 908.)

"We hasten to add that our staff is a dedicated, professional, highly competent one. The observation of the Court merely points out an inevitable facet of the unique position of our staff. There can be no denying that the principal representative of the residential and small business ratepayer is in fact the staff, whose job it is to challenge a utility's showing and recommend the minimum rates necessary to ensure adequate service and provide a reasonable return to the utility. The staff, however, may not pursue appeals. Thus, if residential and small business ratepayers are to be fully protected, it is necessary that they be represented in our proceedings . . . .

"Furthermore, while we believe that the opportunities for compensation for participation in our proceedings help assure the development of a full and fair record, we recognize the merit of the Center and Simmons' contention that such opportunity may seem illusory to an individual ratepayer. What the complainants propose is another alternative, which relies neither upon increased funding through rates nor necessarily upon compensation under one of our present procedures. It appears that there are many ratepayers in SDG&E's service area who would relish the opportunity of belonging to an organization which could afford to hire

> people with technical expertise to represent their particular interests in proceedings as technical as most of our major cases are. In fact, many of these ratepayers have written to us to express their support of this UCAN proposal." D.83-04-020, mimeo., pages 7-8.

Based on the evidence and arguments presented in this proceeding, we believe that, in general, TURN's proposals are meritorious. Under each proposal, residential ratepayers in PG&E's service territory would be given an opportunity to be informed of and to support advocacy efforts on their behalf through use of the extra space in the billing envelope. We believe that this would be an appropriate and efficient use of the extra space.

With respect to the specific variations offered by TURN, we believe that it would be premature for us to adopt proposals 1 or 2 at this time. These proposals envision a number of qualified consumer organizations participating in the checkoff program. The organizations would be listed on the materials inserted in the envelope, receive monies contributed by ratepayers, and share in program expenses. To date, however, TURN is the only organization which has sought access to the PG&E billing envelope. Thus, it would be the only organization participating in the checkoff program for an indefinite period of time. Under these circumstances, we believe that the mechanisms outlined in proposals 1 and 2 are neither necessary nor practical at this time.

While we are not adopting proposals 1 or 2 in this proceeding, we are not foreclosing the adoption of similar proposals in the future. Indeed, a checkoff mechanism whereby ratepayers can select among a number of qualified consumer organizations may be both necessary and desirable in situations where more than one organization has sought access to the envelope. We agree

with TURN that an essential element of such a mechanism is the development of neutral criteria to determine eligibility.[6]

In this case we will follow our Legal Division's recommendation and order that proposal 3 be implemented with some modification. We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining eight months and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted.

In this regard, the fact that the extra space is ratepayer property does not affect the fact that PG&E's ability to communicate with its customers also is or may be a beneficial use of that space. Our goal, as expressed in D.93887, is to change the present system to one which uses the extra space more efficiently for the ratepayers' benefit. It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views than they will from only that of PG&E. Implicit in this assumption, of course, is the the ongoing availability of PG&E's views. Currently, no controls are placed on the content of the *Progress* and we will not undertake to control the material inserted by TURN.

We will establish certain requirements to ensure that the process works smoothly. First, priority must be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its material during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing. Otherwise, TURN shall be bound by the schedule discussed below.

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[6] We note that in C.83-08-04 and C.83-12-03 several consumer groups including TURN are seeking access to space in the Pacific Bell envelope. The checkoff mechanisms are among the proposals now under consideration in those proceedings.

Second, TURN shall reimburse PG&E for any costs the company incurs beyond its usual cost of billing that directly result from the addition of TURN's material. Similarly, shareholders should bear costs associated with inserting the *Progress*. We note that currently such costs are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes. This practice should cease and all identifiable costs should be assigned to shareholders. We believe that these costs are minimal.

Third, all of TURN's bill insert material should clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

Fourth, funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

Fifth, TURN will be required to establish an adequate mechanism to account for the receipt and disbursal of funds received through the bill insert process.

Sixth, we will require TURN to prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report should describe TURN's efforts on behalf of PG&E's residential ratepayers in the past year. It should also include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report should be distributed on or before February 1, 1985 and should cover calendar year 1984. A second report should be distributed one year later. Copies of TURN's reports should be filed with this Commission within five days of distribution.

Our order today does not cover every possible contingency. Therefore, in addition to complying with the requirements set forth above, we expect PG&E and TURN to work together in good faith to overcome problems. If insurmountable problems

arise, we may have to issue further clarifying orders. We hope this will not be the case. We want the program to work and we want the parties to make it work.

Actual insertion of TURN's material shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all contributions received through the insert process. TURN should describe the mechanism in its notice. The notice should also identify the months over the next two years during which TURN plans to utilize the extra space. Both PG&E and TURN will be bound by this schedule.

Our action today should not be viewed as restricting access to TURN. The adoption of this proposal in no way precludes other proposals from being considered. Should other proposals be brought before us, we will consider the feasibility and benefits of each at that time. If we find that these proposals are meritorious, we could order that extra space be made available for the new program along with any previously authorized ones. Alternately, we could modify today's decision to provide for the implementation of a checkoff program as discussed above. This is consistent with the approach adopted in our UCAN decision.

Constitutionality of Commission Regulating the Use of the Billing Envelope Extra Space

Although we have already stated that the question of who owns the extra space should not be relitigated in this proceeding, we are also mindful that the constitutional arguments which PG&E (and to a lesser extent CAUS) has raised are jurisdictional in nature. Therefore, despite our conviction that the issue was properly determined in D.93887, we address below the constitutional claims made by PG&E. Four such claims were made: that the First Amendment to the United States Constitution prohibits the Commission from regulating envelope use; that the First Amendment prohibits the Commission from requiring

PG&E to distribute the message of others; that TURN's proposal violates the equal protection provisions of both the United States and State constitutions; and that TURN's proposal constitutes an unlawful "taking" of property under the Fifth and Fourteenth Amendments to the United States Constitution.

a. *Regulation of Use of the Extra Space by the Commission*

The most basic opposition to the Commission's adoption of TURN'S proposal is grounded in PG&E's claim that the First Amendment to the United States Constitution deprives us of jurisdiction over the regulation of the use of the billing envelope extra space.

The pivotal cases on this are *Consolidated Edison Co. of New York v Public Service Commission of New York* (1980) 447 US 530 (*Con Ed*) and its companion, *Central Hudson Gas & Elec. Corp. v Public Service Commission of New York* (1980) 447 US 557 (*Central Hudson*). These cases both involved attempts by our analogue in New York, the Public Services Commission (PSC) to prevent utilities from including certain kinds of inserts in its billing envelopes. *Con Ed* involved political advertising in support of nuclear power. *Central Hudson* involved advertising promoting the use of electricity. The U.S. Supreme Court found that each of these types of expression was protected by the First Amendment.

While PG&E claims that the TURN proposal violates all the constitutional standards for First Amendment regulation, we believe that even assuming these tests are applicable, all those standards have been met by the proposal version we adopt here.

1. *Time, Place, and Manner Restriction*

The court in *Con Ed* specifically held that it had long recognized

> "... the validity of reasonably time, place, or manner regulations that serve a significant governmental interest and leave ample alternative channels for communication." 447 US at 535.

The court made it clear that such regulation "may not be based upon either the content or subject matter of speech." 447 US at 536. Assuming for argument that PG&E has some property right in this extra space, the proposal which we adopt here would be a "reasonable time, place, or manner" restriction in that it requires PG&E to share the extra space with TURN for a purpose which significantly benefits ratepayers. Our order also leaves PG&E with "ample alternative channels for communication." Indeed, PG&E is allowed to use the extra space to communicate to ratepayers two-thirds of the time over the next two years. However, the restriction does not impinge on the content or subject matter of PG&E's messages. Therefore, the proposal as adopted meets this standard.

2. *Permissible Subject Matter Regulation*

PG&E claims that the TURN proposal requires the Commission to indulge in impermissible subject matter regulation in that it asks the Commission to find that the proposed use of the billing envelope is a better use than PG&E's present use of the billing envelope. In effect, PG&E asserts, TURN is asking the Commission to "evaluate the contents and purpose of its proposed message, versus the contents of PG&E printed materials." (PG&E's Motion to Dismiss, p. 16) PG&E mischaracterizes TURN's proposal. The proposal does not require the Commission to look at content at all. It only attempts to respond to our invitation for suggestions on how to use the economic value of the extra space more efficiently for the ratepayers' benefit. To the extent that the proposal as adopted restricts PG&E's use of the extra space, it does so on the grounds that the space belongs to the ratepayers and that this restriction is made pursuant to our overall regulatory authority, not on the basis of content. In any case, the proposal as we adopt it is neutral as to content of the parties' messages and, therefore, meets this subject matter standard.

3. *Narrowly-tailored Means of Serving a Compelling State Interest*

As PG&E asserts, when a party advocates that the State regulate a fundamental right, such as PG&E's First Amendment right to speak, there must be a demonstrable compelling State interest for such regulation. See, for example, *Louisiana v NAACP* (1961) 366 US 293, 6 Legal Ed 2d 301 cited by PG&E. In that case the Supreme Court in a 5-page decision found unconstitutional two Louisiana statutes, one of which required certain organizations to file annual affidavits that the officers of their foreign affiliates were not members of subversive organizations, and the other of which required the organization to file a list of the names and addresses of all its members and officers in the State. The court held that such governmental regulation violated First Amendment guarantees because it could have the effect of stifling, penalizing, or curbing "the exercise of First Amendment rights", and was thus not narrowly enough drawn to "prevent the supposed evil" it was meant to prevent. (366 US at 297.)

In the present matter a compelling State interest in regulating the use of the extra space has been demonstrated and the TURN proposal as we adopt it does regulate that use in a constitutionally permissible way.

The compelling State interest is one we set forth in our *UCAN* decision:

> "The State interest, of course, is the assurance of the fullest possible consumer participation in CPUC proceedings and the most complete understanding possible of energy-related issues." (D.83-04-020 at p.17.)

The fact that we have adopted a shared approach to use of the extra space surely exhibits the "narrowly-tailored means of serving a compelling state interest" that the *Con Ed* court contemplated.

Of course this issue only arises where the governmental entity is restricting some right that the party in question possesses. Here, PG&E claims that the right is the right to speak through unregulated and exclusive use of the extra billing envelope space. As we have reiterated many times now, since that space is not the property of PG&E in the first place, it has no right to use the space for First Amendment purposes.

Distributing the Message of Another

PG&E cites, among others, the cases of *Wooley v Maynard* (1977) 430 US 705 and *Miami Herald Publishing Co. v Tornillo* (1974) 418 US 241 for the clear proposition that the First Amendment right to free speech also includes the right to refrain from speaking and the right not to be compelled by government to publish that which one does not wish to publish. PG&E contends that each of these rights is breached if we order it to permit access by another to the extra space in its billing envelopes and allow messages of those entities to be carried in that extra space.

This argument, of course, again assumes that we are asking PG&E to publish the messages of TURN or others. In fact, as we explained above, we are simply ordering PG&E, which has physical control over the billing space, to make it available for the benefit of ratepayers. We are not asking PG&E to publish anything as its own. In fact, in order to protect against the possibility that one receiving a PG&E billing envelope would assume all its contents were generated by the utility, we will require that all of TURN's bill insert material clearly identify TURN as its source and state that their contents are not endorsed by PG&E.

In addition to ordering PG&E to make the space available we are also ordering it to do one thing further, and that is to use its equipment to put the inserts of others into the billing envelope extra space. We do not believe that this act is equivalent to publication. It is merely a requirement clearly within our statutory authority to regulate the practices of the utility. Of course,

we will require that TURN pay to PG&E all costs which PG&E incurs beyond its normal billing costs. We have chosen this method of inserting these messages over any other because it appears to be the one which will result in the lowest cost to the ratepayers as well as the least disruption to the utility's billing process.

Distribution of the message here is incidental to the right of the ratepayers to use the extra space, We conclude that these circumstances do not violate the First Amendment protections against being required to publish the statements of others.

Equal Protection

PG&E claims that TURN's proposal violates the equal protection clause of the Fourteenth Amendment to the United States Constitution and the equal protection provision of the California Constitution at Article I, Section 7, because (1) the consumer advocate is given a preferred position vis-a-vis the utility; (2) consumer advocate groups representing residential ratepayers are treated differently from consumer advocate groups representing nonresidential ratepayers; (3) the Commission is forced to draw distinctions, even among residential consumer advocate groups, between those who meet the criteria of technical competence and those who do not (see PG&E's Motion to Dismiss, p.31). PG&E's argument implies that because a fundamental constitutional right is involved—First Amendment freedom of speech—the Commission must show a compelling state interest for discrimination of the sort described. We have already described that state interest above.

We believe TURN's proposal, as we have adopted it, furthers this interest by assuring more complete ratepayer understanding and participation in energy issues involving their utility. Furthermore, the discrimination alleged does not exist. First, the proposal as we are adopting it permits TURN and the utility to share the extra space. Secondly, no other ratepayer organizations have sought access to the extra space. As discussed above, nothing in

the proposal as we are adopting it prohibits others from seeking access too.

We therefore perceive no equal protection violations.

Taking of Property

Additionally PG&E propounds the argument that use of the extra space in the billing envelope by others constitutes either a taking of private property for public use without just compensation in violation of the Fifth Amendment to the United States Constitution or a deprivation of property without due process of law in violation of the Fifth and Fourteenth Amendments.

Again, the argument rests on PG&E's continued contention that the entire billing envelope, including the extra space, is its private property. Based on this, PG&E distinguishes the circumstances of its billing envelope from the case of *Pruneyard Shopping Center v Robins* (1980) 447 US 74, 64 L ed 2d 741, which upheld an interpretation of the California Constitution's provisions regarding free expression and petition requiring the owner of a shopping center to permit students to distribute literature and seek support for their petitions. The U.S. Supreme Court found that this interpretation did not amount to a taking under the Fifth or Fourteenth Amendments. PG&E points to the fact that the Supreme Court emphasized that the shopping center differed from other private property in that by choice of its owner it was not limited to the owner's personal use, but was "open to the public to come and go as they please". (Id p.87).

We note, however, that, in context, this observation of the court was used to explain that: "The views expressed by members of the public . . . thus will not likely be identified with those of the owner." (Id p.87.) We are adopting a similar safeguard by requiring that TURN clearly identify its material and state that it has been neither reviewed nor endorsed by PG&E. So, even if the billing envelope were regarded as PG&E's private property, the distinction cited by PG&E is irrelevant.

PG&E also cites the California Supreme Court's decision in *Pacific Telephone and Telegraph Co. v Public Utilities Commission* (1950) 34 C 2d 822 as support for its conclusion that no ratepayer property rights can devolve from ratepayer payment of bill mailing expense. PG&E cites the court's quotation from a 1913 case where it states:

> ". . . And, finally, it may not be amiss to point out that the devotion to a public use by a person or corporation of property held by them in ownership does not destroy their ownership and does not vest title to the property in the public so as to justify, under the exercise of police power, the taking away of the management and control of the property from its owners without compensation, upon the ground that public convenience would be better served thereby . . ." (Id pp.828-829 quoting *Pacific Telephone Etc. Co. v Eshleman* (1913) 166 C 640, 665.)

We think PG&E's reliance on this language is misplaced. The very central point PG&E ignores here is that the extra space is *not* "property held by [PG&E] in ownership". As discussed above, the extra space is a byproduct of the billing process which is paid for by ratepayers.

PG&E also cites *Board of Public Utility Commissioners v New York Telephone Co.* (1926) 271 US 23, 70 L ed 808 for the proposition that ratepayers cannot acquire any interest in the property "used for their convenience". (271 US at 32.) That case, however, had to do with a Commission requiring a utility to set rates at a rate that was conceded to be less than projected costs in order to make up for high returns in a previous year. The court's final statement explains the context in which it discussed ratepayer property rights:

> "The property or money of the company represented by the credit balance in the reserve for depreciation cannot be used to make up the deficiency [between actual return and conceded expense]."

The Supreme Court was clearly not prohibiting ratepayers from having property rights in objects associated with the utility's enterprise, rather it was stating that a Commission could not treat the utility's accounts as if they belonged to the ratepayers who contributed the money to them by paying for service. This concept has no bearing on the one now before us.

In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious.

Finally, even assuming that the extra space is PG&E's property, it must not be forgotten that PG&E is a monopoly utility closely regulated by this Commission pursuant to authority derived from this State's constitution. Article XII, Section 6, states:

> "The commission may fix rates, *establish rules*, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction." (Emphasis added.)

Section 5 states:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission . . ."

And, the Legislature has enacted PU Code Section 701, which states:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are

> necessary and convenient in the exercise of such power and jurisdiction."

This constitutional and statutory authority provides sufficient basis for a determination by the Commission that PG&E must make the billing space available to its ratepayers, or to representatives of those ratepayers.

Findings of Fact

1. This Commission determined in D.93887 as amended that the extra space in PG&E's billing envelopes has economic value, and that the economic value was created by the ratepayers.

2. Quantification of the economic value of the extra space is subjective and imprecise because it is based on many variables.

3. This Commission determined in D.93887 as amended that the 'extra space' in PG&E's billing envelopes belongs to the ratepayers.

4. This Commission determined in D.93887 as amended that PG&E was itself reaping the economic value of the extra space and by such use was depriving the ratepayers of that value.

5. This Commission in D.93887 declined to order PG&E to take any action to remedy the inequity created by its use of the extra space and the deprivation of the value of that space as to the ratepayers because the record was insufficient for the Commission to determine how the Commission could direct PG&E to use the extra space more efficiently for the ratepayers' benefit.

6. In D.93887, this Commission issued an invitation to TURN or any other interested party to file a complaint with the Commission which would expand the record, especially addressing First Amendment problems, so that the Commission might issue an appropriate order to PG&E regarding how it should use the extra space more efficiently for the ratepayers' benefit.

7. By the present complaint TURN complied with the Commission's invitation in D.93887.

8. TURN's complaint lists three alternatives for utilization of the extra space by itself and possibly other residential consumer advocacy organizations.

9. First Amendment issues were addressed by the parties in written briefs and motions filed with the Commission.

10. At the hearing TURN moved to strike questions and answers 5 and 6 and Table 1 of Exhibit 10, the testimony of PG&E's witness, Thomas C. Long. Staff moved to strike questions and answers 7 and 8 of the same witness. The ALJ took the motions under submission.

11. At the hearing TURN objected to the introduction of PG&E's Exhibit 12, a document entitled "Progress: A Readership Study" and also objected to questions and answers 10 through 17 of Exhibit 11, the prepared testimony of PG&E's witness, Gerald W. Sword, on the same subject. The ALJ sustained the objection.

12. PG&E's requests that the hearing be reopened to permit receipt of the excluded part of Exhibit 11 and Exhibit 2.

13. At the hearing PG&E moved to dismiss for failure of TURN to allege a violation as required by PU Code Section 1702. The motion was denied by the ALJ.

14. PG&E moved to dismiss for TURN's failure to address First Amendment problems in the complaint itself, claiming that this was required by this Commission's mandate in D.93887.

15. PG&E moved to dismiss for TURN's failure to sign the complaint as required by Rule 4 of the Commission's Rules of Practice and Procedure.

16. CAUS claims this Commission lacks jurisdiction over this matter because PG&E has not "dedicated" the billing envelope space to public use.

17. PG&E and CAUS both claim this Commission lacks jurisdiction over this matter because it would interfere with a proper management prerogative.

18. PG&E argues that this Commission is forbidden by the First Amendment from regulating the use of the billing envelope or requiring PG&E to distribute the messages of third parties.

19. PG&E claims that TURN's proposal would violate the equal protection provisions of both the United States and State Constitutions (Fourteenth Amendment and Article I, Section 7, respectively).

20. PG&E claims that TURN's proposal would constitute a taking of property without just compensation in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

21. TURN has demonstrated to this Commission an ability to represent a substantial group of ratepayers in Commission proceedings involving the service or rates of PG&E. Further, TURN has demonstrated that it is a properly constituted nonprofit California corporation, that it is presently involved in Commission proceedings involving PG&E and that it cannot participate in all PG&E proceedings it might otherwise participate in without significant financial hardship.

22. Proposals 1 and 2 envision the participation of a number of consumer organizations.

23. To date, TURN is the only organization which has sought access to the PG&E billing envelope.

24. Costs associated with inserting PG&E's *Progress* are not separated from other costs of preparing the billing envelope and are not treated below the line for ratemaking purposes.

25. The extra space in the billing envelope is a direct consequence of the utility billing process and the way postal costs are assessed.

26. The billing space is inextricably related to routine utility activity.

27. This Commission has allowed utilities to recover all reasonable billing expenses from ratepayers.

28. This Commission has required and permitted utilities to use the billing space as a communications medium for the benefit of ratepayers.

29. Participation by representatives of consumer groups tends to enhance the record in our proceedings and complements the efforts of the Commission staff.

30. TURN's proposal will help assure the fullest possible participation in our proceedings.

Conclusions of Law

1. This Commission's findings on the issue of ownership of the extra space in PG&E's billing envelope in D.93887 as modified should not be relitigated in this proceeding.

2. Findings of Fact 58, 58(a), 59 and 60 of D.93887 as modified should be considered final for the purpose of this proceeding.

3. Objection to the testimony of Thomas C. Long is properly overruled. The testimony should be received.

4. The ALJ's sustaining of the objection to the introduction of all of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 was proper and the request to reopen should be denied.

5. PG&E's motion to dismiss for failure to allege a violation as required by PU Code Section 1702 was properly denied by the ALJ.

6. The motion to dismiss for failure to address the First Amendment problems in the complaint itself should be denied.

7. The motion to dismiss for failure to sign the complaint as required by Rule 4 of our Rules of Practice and Procedure should be denied.

7a. Under the State Constitution and Public Utilities Code, this Commission has the authority to regulate the billing process and to ensure that billing space is used for the benefit of utility ratepayers.

8. The "dedication" concept does not affect the Commission's jurisdiction over this matter.

9. The Commission's assertion of jurisdiction over this matter does not interfere with a proper management prerogative.

10. The First Amendment to the United States Constitution does not deprive this Commission of its ability to regulate the usage of the billing envelope or to require PG&E to distribute the messages of third parties.

11. The TURN proposal as implemented by this decision does not violate the equal protection provisions of either the United States or California constitutions.

12. The proposal as implemented by this decision does not constitute a taking of property in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

13. TURN'S access to PG&E's billing envelope should be contingent on its filing with the Commission notice indicating that an acceptable mechanism has been established to account for receipt and disbursal of all funds obtained through billing envelope solicitation and the months over the next two years TURN plans to insert materials.

14. Proposals 1 and 2 should not be adopted at this time.

15. Proposal 3 should be adopted as modified in this decision.

16. Adoption of proposal 3 as modified should not foreclose the implementation of future meritorious proposals.

ORDER

IT IS ORDERED that:

1. The complete testimony of Thomas C. Long, taken under submission at the hearing subject to legal argument, is received in evidence.

2. The Administrative Law Judge's (ALJ) exclusion of Exhibit 12 and questions and answers 10 through 17 of Exhibit 11 is affirmed and the request to reopen the hearing to receive this evidence is denied.

3. The ALJ's denial of Pacific Gas and Electric Company's (PG&E) motion to dismiss for failure to comply with Public Utilities Code Section 1702 is affirmed.

4. PG&E's motion to dismiss for failure of Toward Utility Rate Normalization (TURN) to address, in the complaint itself, the First Amendment problems is denied.

5. The complaint of TURN is granted to the following extent:

(a) PG&E shall give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E shall be permitted to use the extra space during the remaining eight months and may also make use of any extra space not used by TURN during the months TURN's material is inserted.

(b) PG&E and TURN shall each determine the content of its own material.

(c) Priority shall be given to the billing and legally-mandated notices to customers. If TURN is prevented from inserting its materials during any month because of this priority, it shall be allowed access during another month. This alternate month shall be at TURN's choosing.

(d) Costs of inserting materials in the extra space shall be borne by the sponsor of the materials. PG&E shall bill

TURN for all reasonable costs the company incurs beyond its usual cost of billing that result from the addition of TURN's materials. Costs associated with inserting the *Progress* shall be separated from other billing costs and assigned to shareholders.

(e) All of TURN's material shall clearly identify TURN as its source and state that its contents have been neither reviewed nor endorsed by PG&E or this Commission.

(f) Funds received by TURN from the bill insert process shall be used solely for purposes related to ratepayer representation in Commission proceedings involving PG&E.

(g) TURN shall establish an adequate mechanism to account for the receipt and disbursal of all funds received through the bill insert process.

(h) TURN shall prepare and distribute an annual report to all PG&E ratepayers who contribute to TURN through the bill insert process. The report shall describe TURN's efforts on behalf of residential ratepayers in the past year and include a statement audited by a certified public accountant stating the amount received by TURN from ratepayers through the insert process and how the funds were spent to advance the interests of ratepayers. The first report shall be distributed on or before February 1, 1985, and cover calendar year 1984. A second report shall be distributed one year later. An original and 12 copies of TURN's reports shall be filed with the Commission's Docket Office within 5 days of distribution.

(i) Actual insertion of TURN's materials shall commence 30 days after TURN files a notice with this Commission indicating that an adequate mechanism has been established to account for the receipt and disbursal of all funds received through the bill insert process. TURN shall describe the mechanism in the notice. the notice shall also identify the months over the next two years during which

TURN plans to access the extra space in the billing envelope. Except for the provisions of subparagraph (c) above, both PG&E and TURN shall be bound by the schedule in this notice.

This order becomes effective 30 days from today.

Dated December 20, 1983, at San Francisco, California.

LEONARD M. GRIMES, JR.
President

VICTOR CALVO
PRISCILLA C. GREW
DONALD VIAL
Commissioners

I dissent in part.
/s/ VICTOR CALVO
Commissioner

I dissent.
/s/ WILLIAM T. BAGLEY
Commissioner

Separate Opinions Concurring with and Dissenting from Decision No. 83-12-047

COMMISSIONER VICTOR CALVO, concurring and dissenting in part,

Today's decision represents a significant step towards broader public participation in our proceedings. The use of the extra space in the billing envelope by organizations representing residential ratepayers can only enhance the decision-making process.

Along with my three colleagues, I fully concur that the value of the extra space which remains in the billing envelope ought to inure to the benefit of the ratepayer. Likewise, I fully concur that providing access to the billing envelope to an organization like TURN is desirable. I also anticipate that the same high quality of performance from TURN will prevail in its use of the billing envelope.

Having said this, I feel compelled to dissent in part from the adopted decision. I do so because I have serious reservations about the procedures adopted in the decision rather than the substance of the decision itself.

Specifically, I am troubled by three aspects. First, the decision gives TURN access to the billing envelope four times a year for the next two years. Although TURN is required to file an annual report with the Commission, I would have preferred a procedure which would have established a complete Commission review of the entire experiment after one year. A year's experience would have allowed this Commission to make valuable comparisons of this proposal and the UCAN experiment. At the end of a year's time we would also have been afforded the opportunity for a full review and a complete evaluation of these programs. My concern is that the decision does not formally allow the Commission a realistic opportunity to review the experiment until after a full two years have passed. While I recognize that the Commission may reopen this proceeding at any time, the expectation we have created by this decision is that we should not need to do so until

the two years have elapsed. I am not comfortable with this approach.

The second aspect which concerns me is that there is no formal creation of a panel or board to resolve disputes which are likely to arise between TURN, or any other representative group, and PG&E. I would have preferred for our order to have directed PG&E and TURN to establish an arbitration-type panel, perhaps consisting of one member each from PG&E and TURN, and a third member chosen by both. By creating an arbitration panel, there would be an incentive on the part of both parties to tailor the ratepayer-sponsored bill inserts in a manner that would encourage greater accuracy of content and also eliminate controversy, thus better serving the ratepayer.

The last aspect which concerns me is that the decision does not sufficiently emphasize that TURN is not to be given exlcusive access to the billing envelope. I strongly believe that any other organization meeting the criteria set forth in our decision should be afforded access equal to that given TURN and that there be specified a precise and relatively simplified method for Commission review and decisionmaking.

For all of the reasons set forth above, I concur and dissent.

/s/ VICTOR CALVO
Victor Calvo, Commissioner

December 20, 1983
San Francisco, California

WILLIAM T. BAGLEY, Commissioner, Dissenting:

The Commission majority would create a ratepayer property right, equitable in nature, in the surplus space (i.e., unused postal weight allowance) of billing envelopes mailed to customers by the Pacific Gas and Electric Company. The Commission's acknowledged premise is that such unused space has economic

value (which could be sold) and that such value is contributed to and thus created by the utility ratepayer.[1]

The conclusion in this proceeding, flowing from such premise, is that a single entity representing ratepayers (TURN) is clothed with a property interest in and is thus granted the right to use this "extra space" in four of the monthly billings per year and, by so doing, to preempt and supplant the otherwise constitutionally protected rights of the defendant.[2]

As admirable as the intent may be and as helpful to this Commission and to the ratepayer as the TURN organization is, the majority thus embarks upon a legal journey which reduces itself to an absurdity. Further, basic free speech constitutional rights would be overridden by this question-begging creation of the equitable right in question. In that context, this is a very illiberal decision.

This decision comes complete circle in its rationale and also in its attempt at an evolutionary creation of an equitable-type

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[1] *Pacific Gas and Electric Co.* (1981) . . . Cal.P.U.C.2d . . ., Decision (D.) 93887 (as modified by D.82-03-047 issued March 2, 1982), "We think there are or may be many other uses for the 'extra' space. That such space could be sold to public advertisers (without any extra postage costs) at once demonstrates that the space surely has value. That economic 'value' belongs to the ratepayers, who create the space by paying for the envelope and postage." (Mimeo at p.159b.) See related Findings of Facts 58, 58a, and 59. (Mimeo at pp.220-221.)

[2] "We will require PG&E to give TURN access to the extra space in the billing envelope four times a year for the next two years. PG&E will be permitted to continue to insert the *Progress* during the remaining months." Further, "It is reasonable to assume that the ratepayers will benefit more from exposure to a variety of views . . . ." (Majority opinion at p.23). It is reasonable to state that this last sentence demonstrates the unconstitutional rationale of the majority opinion. "To allow a government the choice of permissible subjects for public debate would be to allow that government control over the search for political truth." *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 538 (62 L.Ed.2d 319, 100 S.Ct. 2326).

property right. Its ostensible ingenuity is only surpassed by its legal illogic. Seemingly taking a cue from the early English High Court of Chancery and finding no remedy at law (i.e., constitutional and statutory authority), and also finding First and 14th Amendment obstacles, it creates an *in personam* right to speak forthcoming from a "property" right in the forum. It thus would obviate all constitutional questions.

This rationale attempts to follow some early equitable principles and at the same time begs the question at issue—whether this Commission has constitutional and statutory powers to order this procedure. This is made evident and obvious by the decision's limited two page (pp.15, 38) discussion of statutory authority and the extensive discussion of the ostensible equitable right.

That such statutory powers of this Commission are limited is the subject of the recent California Supreme Court decision in *Consumers Lobby Against Monopoly v. Public Utility Commission* (1979) 25 Cal.3d 891 (160 Cal.Rptr. 124, 603 P.2d 41). The Court there commented upon both equitable and statutory (Sections 701 and 728 of the Public Utilities Code) powers. The lead opinion stated that the Commission's statutory powers did not extend to awarding attorneys fees, and that its equitable powers only applied in quasi-judicial reparations cases but not in quasi-legislative ratemaking proceedings. (At pp.909-910.) "TURN's theory [of public participation costs] cuts far too broadly . . . and the *consequences of such an interpretation would go far beyond the circumstances presented in this case.*" (Emphasis added). (At p.911).

That latter quotation of our Supreme Court could not be more appropriate in this instant matter. What is this illusory equitable right which would be created and how far would it extend? Is it a constructive trust based on some type of wrongdoing or mistake or perhaps a resulting trust based upon implied intent? Can there be, in California, any type of trust not based upon statute? (*McCurdy v. Otto* (1903) 140 Cal. 48, 73 P. 748.) Or is it an

equitable lien which if not imposed would result in unjust enrichment? (Restatement of Restitution, Section 161.) Perhaps its basis is Henry VIII's Statute of Uses (1536), the central provision of which according to Maitland was "the declaration that where ever one was seised to the use of another, he who had the use should be deemed to have a legal estate corresponding to the interest he had in the use." (J. Cribbet, C. Johnson, Cases and Materials on Property, (4th Ed. 1978) p.297. But the statute of uses has no application under California law. (*Estate of Fair* (1901) 132 Cal. 523, 60 P. 442.)

Regardless of source, what are "the consequences beyond the circumstances presented in this case"? The face of every utility-owned dam, the side of every building, the surface of every gas holder rising above our cities, and the bumpers of every utility vehicle—to name just a few relevant examples—have "excess space" and "economic advertising value". Some utility corporations place bumper-strip messages on their vehicles. Buses and trucks regularly carry advertising messages. In the words of the majority at page 23 of the decision, "It is reasonable to assume that the ratepayers will benefit from exposure to a variety of views . . . ." Is it the postulate of this Commission, flowing from the decision's stated premise, that any three Commissioners at any time might decide that ratepayers would benefit from exposure to some particular socially desirable message from some ratepayer group making use of any or all such areas of excess valuable space? Could the Gun Owners of California, Inc., headed by a politically-active State Senator, convince three future members of this Commission that it should be allowed to promote wood-cutting and wood burning messages to ratepayers as a fuel conservation aspect of the group's espoused rural ethic? And then use that "excess space" message to raise funds to be used by it on behalf of ratepayers. Similarly, the Sierra Club, by a finding of three Commissioners, after an on-the-record proceeding, could be said to represent the conservation interests of ratepayers in ratemaking cases and thus, also, be allotted some of the excess space for recruiting and fund-raising purposes.

And once established as a right, perhaps ultimately *in rem* rather than in the *ad hoc, in personam* method here established, is the right subject to defeasance? Will there not be writs of mandate entertained to protect this established property right in the valued excess space? Of interest, see *Sierra Club v. Morton* (1972) 405 U.S. 727 (92 S.Ct. 1361) which affirmed the Circuit Court and held against plaintiff's standing to sue:

> But if a "special interest" in this subject were enough to entitle the Sierra Club to commence this litigation, there would appear to be no objective basis upon which to disallow a suit by any other bona fide "special interest" organization, however small or short-lived. And if any group with a bona fide "special interest" could initiate such litigation, it is difficult to perceive why any individual citizen with the same bona fide special interest would not also be entitled to do so. (At p.739)

This dissent need not elaborate on the freedom of speech issue which permeates this proceeding. It is sufficient to refer to *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 537 where the Supreme Court states:

> The First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic. As a general matter, "the First Amendment means that government has no power to restict expression because of its message, its ideas, its subject matter, or its content."

But it should be specially noted that this very same Commission, with three of the present majority sitting and without dissent recently stated in *Frankel v. Pacific Gas and Electric Company* (1982) ... Cal.P.U.C.2d ..., D.82-07-009 at mimeo p.3;

> We have ruled that while we may disallow advertising expenses [to be charged to ratepayers] which we will find unreasonable, *we cannot issue gag orders without interfering with a utility's freedom of speech rights.* We adhere to this determination. The U.S. Supreme Court has specifically disapproved advertising prohibitions by regulatory commissions, and has specifically held that the right of free speech extends to corporations. (*Central Hudson Gas & Elec. Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447 U.S. 557; *Consolidated Edison Co. v. Pub. Serv. Comm. of N.Y.* (1980) 447 U.S. 530. (Emphasis added.)

The *Frankel* decision responded to a specific complaint asking that this Commission prohibit the Pacific Gas and Electric Company from publishing certain post-storm promotional messages. It should also be noted that the instant decision effectively prohibits the same defendant from bill-mailed free speech messages during four months of the year. Free Speech is allowed for the remaining two-thirds of the billing year.[3] On that very point, and with the same parties before it, this Commission in the immediate predecessor decision to this proceeding said:

> Even more importantly, it is incumbent on TURN to demonstrate whether it is permissible to ban the *Progress* entirely if we simply intend to use that "extra" space for conservation messages, or other speech, composed by the Commission, interested public participants such as TURN or other parties. This might simply be a substitution of one form of speech for another, a preference for governmentally sponsored or governmentally allowed speech. Such a preference could be more dangerous than the evil which TURN seeks to correct. *Pacific Gas and Electric Co.* (1981) ...Cal.P.U.C.2d..., ..., D.93887 mimeo at p.159e.

Much of the above makes reference to the formation and characterization of certain property and equitable rights and may leave the impression that such rights are thought to be static and

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[3] "PG&E will be permitted to continue to insert the *Progress* during the remaining months." (Majority opinion at p.23.)

sterile—that the defendant's physical ownership and possession of property alone should dictate the result. Such intent should not be inferred. To the contrary, it is acknowledged that:

> (A)n owner must expect to find the absoluteness of his property rights curtailed by the organs of society, for the promotion of the best interests of others for whom these organs also operate as protective agencies. The necessity for such curtailments is greater in a modern industrialized and urbanized society than it was in the relatively simple American society of fifty, 100, or 200 years ago. The current balance between individualism and dominance of the social interest depends not only upon political and social ideologies, but also upon the physical and social facts of the time and place under discussion. (5 Powell, Real Property (1970) Section 745, pp.493-495.)

But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself,[4] it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.[5]

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[4] See discussion in *County of Los Angeles v. Berk* (1980) 26 Cal.3d 201 (161 Cal.Rptr. 742, 605 P.2d 381) including references to Civil Code Section 1009 adopted after *Gion-Dietz*. See also discussion in *Agins v. City of Tiburon* (1979) 24 Cal.3d 266 (157 Cal.Rptr. 372, 598 P.2d 25).

[5] See *Consolidated Edison v. Public Service Commission* (1980) 447 U.S. 530, 540, "But the Commission's attempt to restrict the free expression of a private party cannot be upheld by reliance upon precedent that rests on the special interests in a government in overseeing the use of its property."

In the face of these basic constitutional rights, applicable to all, the majority proposes to create an equitable right which it states will, in the name of ratepayer protection, obviate all concerns and supervene all constitutional constraints. Additionally and unavoidably, the majority decision would result in a legal and administrative morass caused by future extensions of the Commission's decreed property right. Such an exercise is as dangerous as it is unprecedented and unwarranted in the law. If further citation is desired for the proposition that no such right exists, see *Fields v. Michael* (1949) 91 Cal. App.2d 443, (205 P.2d 402).[6]

/s/ WILLIAM T. BAGLEY
William T. Bagley,
Commissioner

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[6] "That no direct authority upon it has been produced must be due alone to the fact that legal evolution had not progressed far enough to develop a needless precedent for a necessary conclusion." 91 Cal.App.2d at p.451.

Separate Opinions Dissenting From Decision No. 84-05-039

COMMISSIONER VICTOR CALVO, Dissenting.

This Commission has done much during its history to ensure full and fair public participation in matters heard before it. Our liberal rules of standing, procedure and evidence are a testament to that history. Today, the majority attempts to expand public participation by permitting Toward Utility Rate Normalization (TURN), a respected and frequent intervenor in our proceedings, to directly solicit interest and funding from the ratepayers of Pacific Gas and Electric Company (PG&E) through the use of the extra space in the billing envelope PG&E sends to its ratepayers. I laud the effort, but for the reasons set forth below, I cannot support it.

The "extra" space in the PG&E billing is really not a "property" but is something of an accident. Relevant postage rates, being based on one ounce increments, are indifferent to whether a mailer uses one-quarter of that ounce, three-quarters of it, or the full ounce. the mailer pays for the fraction as if it were the whole. The monthly bill and the return envelope PG&E sends to its customers normally weighs not the full ounce but a fraction of it. So the question arises, what to do with the difference, the "extra" space?

PG&E currently uses this extra space to send its *Progress*, a shareholder-funded newsletter which, while pleasant and sometimes informative, is nonessential to the provision of safe and reliable utility services. TURN now asks that as a consumer organization it be permitted to periodically use the extra space to reach ratepayers who, if properly informed, might see fit to morally and/or financially support its efforts. In today's order, the majority reaffirms its earlier decision to grant TURN's request. I must dissent from this order. Some of my concerns were expressed in my earlier separate concurring opinion in this matter in which I dissented in part. I will reiterate them here

and, having had time to further reflect on this matter, present additional concerns which now lead me to fully dissent from the majority opinion.

In reviewing this case, I was struck by the similarities between it and the case of *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241 (1974), wherein the Supreme Court struck down a state statute which required newspapers to provide political candidates whom they had criticized an opportunity to respond to the criticism. Similar to the Court's concerns in that case, it is not altogether clear to me that TURN's use of the billing envelope to disseminate its literature is required as a matter of either necessity or right. Thus, I am persuaded that we should not infringe on PG&E's rights of free speech guaranteed to it by the First Amendment.

TURN has other opportunities to reach its natural audience. It may solicit support through its own mailings. Additionally, our rules regarding intervenor fees are frequently used to reward TURN's good efforts and, in fact, in another action today we award TURN $13,102 in attorney's fees for its contribution in a Commission rate case proceeding. I question, therefore, if TURN or any other party *needs* access to the billing envelope in order to be an effective participant in our proceedings. As to rights, TURN certainly cannot lay claim to any greater rights than any other ratepayer or consumer group that might request access to the billing envelope. Thus, I am concerned that this Commission not place itself in a predicament where it will be called upon to resolve disputes as to whom or when or how often a multitude of competing groups or ratepayers should be granted access to the billing envelope. And, of course, the Supreme Court has implied that some rights are held by the utility should it desire to use the extra space for its purposes. *Consolidated Edison Co. v. Public Service Commission of New York*, 447 U.S. 530 (1980).

As to the practical shortcomings of this order, I noted in my separate opinion to Decision 83-12-047 that it is incumbent upon

the majority to specify a precise and relatively simple method to resolve these sorts of disputes. Yet once again that necessity has been avoided by the majority. Also, in my opinion, granting TURN access to the PG&E billing envelope on eight occasions (four times per year for two years) is undue. A meaningful evaluation could take place with respect to a program of this nature within a year, yet the majority grants TURN use of the billing envelope for two full years. I have found both TURN and PG&E to be vigorous advocates and constant adversaries and I would not look forward to resolving additional unnecessary confrontations between them.

I point out here, that I found my concerns to be less compelling and urgent in Decision 83-04-020, *Center for Public Interest Law, et al. v. San Diego Gas and Electric Company*. The "UCAN" organization of that case is a ratepayer founded and comprised group with closer links to its constituency than is the case with TURN. That case was also void of the internecine rivalries between consumer groups with which I am concerned, a rivalry manifested in this case by the presence of the California Public Interest Research Group.

The Legislature has often expressed interest in the issue of public participation in Commission proceedings. Proposals for a consumer utility board comprised of ratepayers have been introduced by various legislators. I would be more inclined to support the majority if some express statutory provision addressed the request now before us. Instead, the majority essentially relies upon implicit authorities found in Public Utilities Code Section 701. I am not wholly convinced by their arguments. But, assuming that the majority is correct, having the authority to do something and deciding whether or when to exercise it are two separate questions. In this case and again assuming we have

authority in this matter, I would not exercise our jurisdiction. Therefore, I must respectfully dissent.

/s/ VICTOR CALVO
Victor Caivo, Commissioner

WILLIAM T. BAGLEY, Commissioner, Dissenting:

This is written to reiterate and emphasize one aspect of my prior dissent in this matter (see D.83-12-047, Dissent of W.T. Bagley). That dissent is attached hereto, incorporated by reference, and is made a part of this dissent to the final order issued by the Commission majority today. After acknowledging an understandable societal dilution of property rights over the years, that dissent stated at page 7:

> But here we deal with more than just a classical property right defense to some type of governmental action or constriction affecting property *per se*. Though certain 14th Amendment property rights have been diluted over the years *vis a vis* an owner's claimed right of usage of the property itself, it is submitted that property rights have never been and should never be eroded, and by judicial fiction transferred to others, in order to justify a governmental constriction on First Amendment principals of free speech. Therein lies a major distinction present in this case.

To restate this basic distinction, it is submitted that there is absolutely no precedent for, or constitutional basis of, a dilution and transfer of a person's property right in order to justify a restriction upon that person's right of free speech. Where a claimed property or governmental right conflicts with the First Amendment, the First Amendment prevails.

Conscious of the fact that the theory of an "equitable property right" in the envelope is illusory at best, the Commission majority now searches for an additional ground or rationale for its

decision. The majority would now, additionally, rely upon an omnibus powers section of the Public Utilities Code.[1]

The majority also would amend a statement made in a most objectionable footnote to the original opinion and order, by adding the thought that defendant PG&E "may use any of the extra space not used by TURN . . .".[2]

Indulging in further contortions, the majority now adds the following paragraph to its original decision at page 34:

> "In granting TURN limited use of the billing space, we have not required PG&E to share its private property. Rather, we have reasonably determined that something which PG&E has *treated* as its own property is, in fact, the property of PG&E's ratepayers. Since the extra space in PG&E's billing envelopes is not the property of PG&E, its "taking" arguments are not meritorious."

That last postulate immediately brings to mind the very recent U.S. Supreme Court decision, reversing the California Supreme Court, and saying that if there were a public trust to be imposed on the subject privately held lagoon, it should have been asserted during its inceptive years and not 130 years later. *Summa Corp. v. California Ex Rel. State Lands Commission et al*, 52 LW 4433 (April 17, 1984).

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[1] "The Commission may supervise and regulate every public utility in the State and may do all things whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction." (Section 701).

[2] See page 23 of the original opinion: "It is reasonable to assume that ratepayers will benefit more from exposure to a variety of views—we will require PG&E to give TURN access to the extra space in the billing envelope four times a year—PG&E will be permitted to continue to insert the Progress during the remaining months".

This is now modified by adding: "*and may also make use of any of the extra space not used by TURN during the months TURN's material is inserted.*" (Emphasis added).

Putting that apt analogy aside, the basic fact remains that the shareholder's right, exercised at shareholder's expense, to use the company's envelope for a First Amendment-protected message is being curbed and transferred to others. And now under the revised order TURN can determine, solely by its choice of paper weight, whether or not and if so how much material may be inserted in the envelope by defendant's management on behalf of the shareholder. See footnote 2, *supra.* Under this order we have the unseemly situation where government, by its order and without specifying any criteria whatsoever, allows one party to proscribe the free speech of the other. That, compared to government proscription, is deprivation squared.

It is of one genre to limit, for example, the size and nature of improvements on ocean and bay front property in order to preserve public view and enjoyment of our natural resources; it is quite another to order such property owner to organize public meetings on his or her view property (four times a year) for the benefit of extraneous interests and to *forbid* that owner from speaking at such gatherings if the other interests object. Literally, the free speech forum—the podium if you will—is being transferred from one party to another by this governmental decision.

The majority's basic problem is that it refuses to recognize that corporate entities are granted and continue to enjoy First Amendment rights. That is exemplified by its facade-like transfer of ownership of the forum, and likewise by its new reliance on Section 701. Just because the legislature grants to the PUC a broad set of powers over public utilities does not make those utilities any less the beneficiaries of First Amendment protections and does not make deprivation of speech rights anymore constitutional.

It is not inordinate to assume that government at some future time would assert additional authority over the newpaper industry, and the many corporate owners thereof. Gasoline rationing was a fact of life not too many years ago. Conceivably there may

come a day when we would face the necessity of paper or newsprint rationing in a monopolized, short supply industry. Congress could, constitutionally, declare suppliers and even a limited number of distributors to be "Public Utilities". But neither Congress nor the Legislature—nor the designated regulatory body—could instruct the corporate newspaper owner to use or not use fuel in pursuit of a given story, nor could the newspaper supplier be ordered to limit its sales to certain desirable news usages, even though those suppliers were legally denominated "monopoly public utitlites" and placed under a statute comparable to Section 701.

In its verve to support "consumer rights", this majority has run rough-shod over basic constitutional rights of free speech—and without giving thought to logical extensions of its act. Would it extend its free speech constrictions to other corporate entities which might be regulated in the future just because they are regulated. And who, after TURN gets its chance, will next be able to control this defendant's right to speak. In the context of the First Amendment, this is a very illiberal decision by a majority who would seek to liberalize consumers rights at the expense of the right of Free Speech. I would remind the majority that in the past other seeming Democratic societies, on a larger scale, have followed a similar path. They are no longer Democratic societies.

/s/ WILLIAM T. BAGLEY
William T. Bagley, Commissioner

May 2, 1984
San Francisco, California

Appendix B

Cal. Const. art XII, § 6, provides:

> "The commission may fix rates, establish rules, examine records, issue subpenas, administer oaths, take testimony, punish for contempt, and prescribe a uniform system of accounts for all public utilities subject to its jurisdiction."

Cal. Const. art. XII, § 5, provides:

> "The Legislature has plenary power, unlimited by the other provisions of this constitution but consistent with this article, to confer additional authority and jurisdiction upon the commission, to establish the manner and scope of review of commission action in a court of record, and to enable it to fix just compensation for utility property taken by eminent domain."

Cal. Pub. Util. Code § 701 provides:

> "The commission may supervise and regulate every public utility in the State and may do all things, whether specifically designated in this part or in addition thereto, which are necessary and convenient in the exercise of such power and jurisdiction."

Cal. Pub. Util. Code § 728 provides in pertinent part:

> "Whenever the commission, after a hearing, finds that the rates or classifications, demanded, observed, charged, or collected by any public utility for or in connection with any service, product, or commodity, or the rules, practices, or contracts affecting such rates or classifications are insufficient, unlawful, unjust, unreasonable, discriminatory, or preferential, the commission shall determine and fix by order, the just, reasonable, or sufficient rates, classifications, rules, practices, or contracts to be thereafter observed and in force."

Cal. Pub. Util. Code § 729 provides:

"The commission may, upon a hearing, investigate a single rate, classification, rule, contract, or practice, or any number thereof, or the entire schedule or schedules of rates, classifications, rules, contracts, and practices, or any thereof, of any public utility, and may establish new rates, classifications, rules, contracts, or practices or schedule or schedules in lieu thereof."

Cal. Pub. Util. Code § 761 provides:

"Whenever the commission, after a hearing, finds that the rules, practices, equipment, appliances, facilities, or service of any public utility, or the methods of manufacture, distribution, transmission, storage, or supply employed by it, are unjust, unreasonable, unsafe, improper, inadequate, or insufficient, the commission shall determine and, by order or rule, fix the rules, practices, equipment, appliances, facilities, service, or methods to be observed, furnished, constructed, enforced, or employed. The commission shall prescribe rules for the performance of any service or the furnishing of any commodity of the character furnished or supplied by any public utility, and, on proper demand and tender of rates, such public utility shall furnish such commodity or render such service within the time and upon the conditions provided in such rules."

Cal. Pub. Util. Code § 762 provides in pertinent part:

"Whenever the commission, after a hearing, finds that additions, extensions, repairs, or improvements to, or changes in, the existing plant, equipment, apparatus, facilities, or other physical property of any public utility or of any two or more public utilities ought reasonably to be made, or that new structures should be erected, to promote the security or convenience of its employees or the public, or in any other way to secure adequate service or facilities, the commission shall make and serve an order directing that such additions, extensions, repairs, improvements, or

changes be made or such structures be erected in the manner and within the time specified in the order."

Cal. Pub. Util. Code § 1709 provides:

"In all collateral actions or proceedings, the orders and decisions of the commission which have become final shall be conclusive."